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In the

Supreme Court of the United States

OCTOBER TERM, 1984

NO.

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSTON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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10 pp

QUESTIONS PRESENTED FOR REVIEW

Congress mandated, in the express language of the Communications Act of 1934, that jurisdiction over telecommunications be divided between the federal government and the states. The Federal Communications Commission (F.C.C.) was granted authority over interstate and international communications, 47 U.S.C. §151, while authority over the intrastate activities was clearly reserved to the states, 47 U.S.C. §§152(b) and 221(b). On January 6, 1983, the F.C.C. issued a *Memorandum Opinion and Order* which reversed its fifty year old interpretation of the Communications Act and announced it was preempting state regulation of intrastate depreciation methods. 92 F.C.C.2d 864 (1983). Against this background, the questions presented are as follows:

1. Whether the F.C.C.'s *Memorandum Opinion and Order* purporting to preempt state regulation of intrastate depreciation methods is ultra vires as a patent violation of the Communications Act of 1934;

2. Whether a district court has jurisdiction and discretion to refuse to enforce an ultra vires action of the F.C.C.; and

3. Whether the F.C.C.'s *Memorandum Opinion and Order* is enforceable in a district court as an "Order" within the meaning of 47 U.S.C. §401(b).

PARTIES

The parties to the proceeding before the U.S. Court of Appeals for the Eighth Circuit are listed below.

Arkansas Public Service Commission;
Robert E. Johnston, Commissioner;
Patricia S. Qualls, Commissioner;
and James W. Daniel, Commissioner

Southwestern Bell Telephone Company

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SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Arkansas Public Service Commission (A.P.S.C. or Arkansas Commission) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 7, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is attached at Appendix, p. A-43. The opinion of the United States Court of Appeals for the First Circuit is attached at Appendix, p. A-56. The opinion of the

United States District Court for the Eastern District of Arkansas, Western Division, is attached at Appendix, p. A-34, and was not reported. The *Memorandum Opinion and Order* (Preemption Ruling) of the Federal Communications Commission (F.C.C.) is reported at 92 F.C.C.2d 864 (1983), and is attached at Appendix, p. A-1.

JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered June 7, 1984. The Arkansas Public Service Commission's Petition for Rehearing en banc was denied on July 3, 1984. This petition was filed within ninety days of the denial of the Petition for Rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Appendix, pp. A-71 through A-74.

STATEMENT OF THE CASE

On April 27, 1982, the F.C.C. formally announced what had been its undisputed policy since the passage of the Communications Act of 1934 (Communication Act or Act). In a *Memorandum Opinion and Order* the F.C.C. stated that state regulatory commissions are not preempted by the F.C.C. from adopting depreciation methods for purposes of intrastate ratemaking which are inconsistent with methods approved by the F.C.C. 89 F.C.C.2d 1094 (1982) (April 27 Order). In the April 27 Order the F.C.C. reviewed the Communications Act, its legislative history, and years of case law, and concluded that there was no clear Congressional intent to preempt inconsistent state prescription of depreciation rates, and further concluded that such state regulation would not frustrate or conflict with valid federal policies.

Nine months later, in a rulemaking proceeding, the F.C.C. reversed this position and concluded that the language and legislative history of 47 U.S.C. §220(b), coupled with its authority to preempt state actions that interfere with federal policies, empowered it to preempt inconsistent state depreciation policies and rates. *Memorandum Opinion and Order*, 92 F.C.C.2d 864 (1983) (the Preemption Ruling). The Preemption Ruling applies Equal Life Group and Remaining Life depreciation methods to intrastate rates and preempts the adoption of contrary methods by state commissions.

In March 1983 Southwestern Bell Telephone Company (Bell or Southwestern Bell) filed an application for a rate increase with the A.P.S.C. for its intrastate services. Part of its request was based on the increased depreciation expenses resulting from the F.C.C.'s Preemption Ruling.

The Arkansas Commission rejected this portion of Bell's application and stated that the F.C.C.'s purported preemption of the A.P.S.C.'s authority over the setting of

intrastate depreciation methods was unlawful. The A.P.S.C. approved a different depreciation method, the Whole Life method.

Bell initiated the state administrative remedy of requesting a rehearing before the A.P.S.C. on this issue. Ark. Stat. Ann. §73-229.1 (Repl. 1979). The A.P.S.C. set a date for rehearing. In the interim, Bell filed a complaint in federal district court. Bell subsequently withdrew its request for rehearing before the A.P.S.C.

The complaint alleged federal court jurisdiction under 28 U.S.C. §§1331 and 1337, as well as 47 U.S.C. §401(b), and sought declaratory and injunctive relief to compel the A.P.S.C. to abide by the F.C.C. mandated depreciation methods. Bell alleged that the Preemption Ruling was an "Order" (as opposed to rulemaking) and was enforceable by a private party against a state commission under §401(b).

The District Court denied relief holding that the Preemption Ruling is ultra vires because the F.C.C. lacks jurisdiction to preempt state authority over depreciation methods used for intrastate ratemaking. The court also denied injunctive relief under 47 U.S.C. §401(b) on the ground that an ultra vires ruling cannot be "regularly made" within the meaning of that statute. Finally, the court reviewed Bell's request for injunctive relief under the traditional equitable criteria. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). It held that Bell failed this standard for two reasons: (1) it had no probability of success on the merits because the F.C.C. ruling is ultra vires and (2) the public interest factor weighed heavily on the side of the Arkansas Commission.

Bell appealed to the Eighth Circuit Court of Appeals. On June 7, 1984, the Circuit Court, in an expedited appeal, reversed the District Court, holding that: (1) a district court is without jurisdiction to determine the legality of the

F.C.C. ruling; (2) the Preemption Ruling is a self-executing order entitled to the same preemptive effect as a federal statute; (3) a district court is without jurisdiction to deny enforcement of the F.C.C. ruling on the basis that it is ultra vires; and (4) the District Court abused its discretion in denying injunctive relief on the grounds that Bell had failed to pass the traditional equitable criteria in addition to the statutory requirements.

The Circuit Court directed the District Court to enjoin the A.P.S.C.'s noncompliance with the depreciation methods mandated by the F.C.C. pending the outcome of *Virginia State Corporation Commission v. F.C.C.*, No. 83-1136 (4th Cir. June 18, 1984). The Eighth Circuit directed the District Court to enter a final order consistent with the final ruling of the Fourth Circuit.

The action in the Fourth Circuit is an appeal of the F.C.C. Preemption Ruling in which the authority of the agency to preempt the states is being challenged pursuant to 28 U.S.C. §2342(1) and 47 U.S.C. §402(a). On June 18, 1984, the Fourth Circuit entered an opinion affirming the Preemption Ruling. However, Petitions for Rehearing en banc are presently pending before the Fourth Circuit.

The Eighth Circuit, in its opinion of June 7, 1984, held that the court of appeals is the exclusive avenue for any type of legal challenge to the F.C.C.'s asserted preemption and any other issue touching the validity of it. Preemption Ruling.

REASONS FOR GRANTING THE WRIT

a. The Decision of the U.S. Court of Appeals for the Eighth Circuit conflicts with this Court's Decisions in *Leedom v. Kyne*, *Hecht v. Bowles*, and *Federal Maritime Commission v. Seatrain Lines, Inc.*

Southwestern Bell brought its complaint in the District Court pursuant to three separate federal statutes, 28 U.S.C. §§1331 and 1337, and 47 U.S.C. §401(b). The complaint asked the District Court to enforce a decision by the F.C.C. by using the court's equitable powers of injunction.

While the statutory provisions of 28 U.S.C. §§1331 and 1337 are grants of general jurisdiction, 47 U.S.C. §401(b) specifically grants district courts original jurisdiction over actions brought to enforce orders of the F.C.C. The District Court, by the very nature of the action, possesses broad equitable jurisdiction and discretion.

There is no language in 28 U.S.C. §§1331 and 1337, and 47 U.S.C. §401(b) which, by express language or inescapable inference, restricts the equitable powers of a district court in determining whether to lend its enforcement powers to any agency decision. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ." 28 U.S.C. §1337(a).

> If any person fails or neglects to obey an order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was

> regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

74 U.S.C. §401(b).

This Court stated in *Porter v. Warner Holding Co.*, 328 U.S. 395, 90 L.Ed 1332, 66 S.Ct. 1086 (1946):

> *Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.* Virginian R. Co. v. System Federation, R.E.D. 300 US 515, 552, 81 L ed 789, 802, 57 S Ct 592. *Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."* Hecht Co. v. Bowles, 321 US 321, 329, 88 L ed 754, 760, 64 S Ct 587. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. *In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.* Camp v. Boyd, 229 US 530, 551, 552, 57 L ed 1317, 1326, 1327, 33 S Ct 785.
>
> *Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence*

of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. (US) 497, 503, 9 L ed 508, 511. See also Hecht Co. v. Bowles, supra (321 US 330, 88 L ed 761, 64 S Ct 587).

It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under §205(a). Indeed, the language of §205(a) admits of no other conclusion. It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant "a permanent or temporary injunction, restraining order, or other order." As recognized in Hecht Co. v. Bowles, supra (321 US 328, 88 L ed 759, 64 S Ct 587), the term "other order" contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion. An order for the recovery and restitution of illegal rents may be considered a proper "other order" on either of two theories:

(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available. White v. Sparkill Realty Corp. 280 US 500, 74 L ed 578, 50 S Ct 186; Lacassagne v. Chapuis, 144 US 119, 36 L ed 368, 12 S Ct 659. *But where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the*

> *court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law.* Alexander v. Hillman, 296 US 222, 241, 242, 80 L ed 192, 200, 201, 56 S Ct 204.
>
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. Section 205(a) anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such order might take. *The problem of formulating these orders has been left to the judicial process of adapting appropriate equitable remedies to specific situations.* Cf. Phelps Dodge Corp. v. National Labor Relations Bd. 313 US 177, 194, 85 L ed 1271, 1283, 61 S Ct 845, 133 ALR 1217. *In framing such remedies under §205(a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress.* Clark v. Smith, 13 Pet. (US) 195, 203, 10 L ed 123, 127. [Emphasis supplied.]

328 U.S. at 398-400.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 72 L.Ed.2d 91, 102 S.Ct. 1978 (1982), the Court explained:

> *The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. TVA v. Hill*, 437 US, at 193, 57 L.Ed.2d 117, 98 S.Ct. 2279; *Hecht Co. v. Bowles, supra*, at 329, 88 L.Ed. 754, 64 S.Ct. 587.
>
> These commonplace considerations applicable to cases in which injunctions are sought in the federal courts

> reflect a "practice with a background of several hundred years of history," *Hecht Co. v. Bowles, supra*, at 329, 88 L.Ed. 754, 64 S.Ct. 587, a practice of which Congress is assuredly well aware. *Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. Hecht Co. v. Bowles, supra*, at 329, 88 L.Ed. 754, 64 S.Ct. 587. [Emphasis supplied.]

456 U.S. at 313.

And in *Hecht v. Bowles*, 321 U.S. 321, 88 L.Ed. 754, 64 S.Ct. 587 (1944), the Supreme Court upheld the power of a federal court of equity to deny injunctive relief in the face of a statute which on its face mandated the issuance of such relief:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-330.

It is clear that when the district courts are called upon to issue injunctive relief based upon a statute whose language is apparently mandatory, those courts are not required " . . . to stand aside and rubber-stamp affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 746, 36 L.Ed.2d 620, 634, 93 S.Ct. 1773 (1973).

This Court has additionally clarified the extent of the jurisdiction of a district court to reckon with the action of a

federal administrative agency that acts in excess of its legal authority. In *Leedom v. Kyne*, 358 U.S. 184, 3 L.Ed.2d 210, 79 S.Ct. 180 (1958), this Court held that, under 28 U.S.C. §1337, the district courts have jurisdiction to affirmatively attack and vacate an administrative agency's action made in excess of its lawful authority. This jurisdiction exists independent of the statutory review provision. This Court authorized the district court determination by saying that it

> . . . is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

358 U.S. at 188. *See also, Harmon v. Brucker*, 355 U.S. 579, 2 L.Ed.2d 503, 78 S.Ct. 433 (1958).

In view of the authority of *Hecht and Seatrain, supra*, the Eighth Circuit's decision, that a district court is without jurisdiction to refuse to enforce the Preemption Ruling, is contrary to the law of the land.

First, the Eighth Circuit erred in finding that 28 U.S.C. §2342(1) and 47 U.S.C. §402(a) preempt the exercise of the type of district court jurisdiction asserted herein. Under 28 U.S.C. §2342(1) the courts of appeals are given " . . . exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of (1) all final orders of the Federal Communications Commission . . . ."

This court of appeals remedy is in no way involved in the §401(b) proceeding brought in the District Court by Bell. Therefore, it cannot preempt district court jurisdiction over necessary legal determinations brought forth under §401(b).

Bell did not bring its complaint under 28 U.S.C. §2342(1). Moreover, the A.P.S.C. did not defend under that statute. A

proceeding under 28 U.S.C. §2342(1) is an entirely different remedy than one under 47 U.S.C. §401(b), as can be seen by a reading of the statutes.

The Eighth Circuit's decision that 28 U.S.C. §2342(1) disposes of a district court's jurisdiction to declare the Preemption Ruling ultra vires relies on three cases, *F.C.C. v. I.T.T. World Communications*, 52 U.S.L.W. 4507 (U.S. Apr. 30, 1984); *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116 (7th Cir. 1982); and *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979). These cases are easily distinguished. None of the cases involve the enforcement of an F.C.C. decision *under the specific jurisdictional base of 47 U.S.C. §401(b).*

By asserting 47 U.S.C. §401(b) as its jurisdictional base, Bell invoked the equitable powers and jurisdiction of a federal district court. This negates the value of these three cases as precedent because in each of these cases the presence of a specific jurisdictional grant to the district court is absent. That is clearly not the case here. There is *no authority* that sets forth the operational frontiers of a district court in a §401(b) proceeding. Therefore, this is a case of first impression.

Here, the District Court properly asserted original jurisdiction under §401(b). There is no language in §401(b) or §2342(1) which expressly, or by inescapable inference, limits the district courts' broad equitable jurisdiction. Neither is there any language in these statutes limiting the ancillary jurisdiction of the court.

Furthermore, §401(b) does not define the term "regularly made" to refer only to procedural regularity as announced by the Eighth Circuit. Appendix, p. A-52. Such definition violates the wisdom of *Hecht* and *Seatrain* by imposing on district courts a mandate to issue injunctions mechanically. Moreover, such definition withholds from district courts any authority to strike down actions of an

agency which are patently illegal simply because the agency observed procedural niceties.

It is a dangerous precedent indeed to deprive the courts, when being asked to enforce an administrative decision, of the fundamental authority to determine if an agency decision on its face is jurisdictionally valid. Petitioner submits that "regularly made" includes at least a finding that the agency acted within its jurisdiction. Clearly, if district courts, under *Leedom*, have jurisdiction (under the general provisions of 28 U.S.C. §§1331 and 1337) to affirmatively attack and vacate an agency action in excess of is lawful authority, then those same courts have jurisdiction to refuse to enforce an ultra vires act. *See*, 4 Davis, Administrative Law Treatise §26:4 (2d Ed. 1983).

The Eighth Circuit struggles to the tortured conclusion that §2342(1) preempts the district courts from declaring an administrative action to be ultra vires by arguing that " . . . otherwise the exclusive provision of the statutory review procedure set forth in 28 U.S.C. §2342(1) and 47 U.S.C. §402(a) would be superfluous." Appendix, p. A-52.

Such a conclusion, however, begs the question of why the Congress enacted §401(b), which expressly gives district courts jurisdiction. The very existence of §401(b) destroys the Eighth Circuit's rigid approach to the idea that, under the authority of *City of Peoria*, *City of Rochester*, and *I.T.T. World*, *supra*, the §2342(1) remedy is exclusive; exclusive to the point of making the district courts a rubber-stamp for decisions of administrative agencies.

The Eighth Circuit seems to be saying that under §401(b) district courts have the power to issue injunctive relief, but no power to refuse such relief if the grounds for such refusal touch in any way on the lawfulness of the agency decision. The Eighth Circuit asserts this would lead to "de novo factfinding", which would interfere with the necessary review of the administrative record. Appendix, p. A-51.

But here the District Court had no record before it and made no finding of fact. The court merely reviewed the face of the agency decision and found as a matter of law that it was a nullity and unenforceable. It was not the District Court that exceeded its lawful authority, but the F.C.C.

District courts have authority under §401(b), §1331 and §1337 to make such fundamental initial determinations as whether an agency action, which a court is asked to enforce, is in excess of the agency's lawful authority.

Finally, the affirmance of the Eighth Circuit's decision would deprive the defendants in an enforcement proceeding of a fundamental defense, i.e., the unlawfulness of the agency's action. In many cases this would be the only defense available if, as mentioned earlier, the agency followed procedural niceties. Such a restriction would conflict with the essential goal of a court in an equitable proceeding, the goal to do "complete justice".

b. The Decision of the U.S. Court of Appeals for the Eighth Circuit Involves an Important Question of Federal Law Which Has Not Been, But Should Be Settled by this Court.

The action of the F.C.C. in adopting the Preemption Ruling has caused an explosion of federal litigation. This Court has already entered a stay of an Ohio Supreme Court mandate which refused enforcement of the F.C.C. Preemption Ruling. *Cincinnati Bell Telephone Co. v. Public Utilities Commission of Ohio*, No. A-70. Other cases addressing the issue of the lawfulness of the F.C.C. decision are: *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984); *Virginia State Corporation Commission v. F.C.C.*, No. 83-1136 (4th Cir. June 18, 1984); *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983), *appeal*

docketed, No. 83-3746 (9th Cir. April 7, 1984); *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F. Supp. 490 (D. Vt. 1983), *appeal docketed*, No. 84-7051 (2d Cir. Jan. 17, 1984); *Wisconsin Bell Telephone Co. v. Wisconsin Public Service Commission*, No. 84-C-004 (E.D. Wis. filed Jan. 4, 1984); *Chesapeake & Potomac Telephone Co. of Maryland v. Maryland Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983), *appeal docketed*, No. 83-1403 (4th Cir. May 3, 1983); and *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983), *appeal docketed*, No. 83-3494 (5th Cir. Oct. 11, 1983).

The issue for purposes of this Petition is whether the F.C.C.'s Preemption Ruling is ultra vires in light of the Communications Act of 1934. Clearly, it is.

The Communications Act expressly reserves to the states the authority to prescribe rates for intrastate and local telephone service. 47 U.S.C. §152(b) and §221(b). Appendix, pp. A-72, A-74. These provisions explicitly forbid the F.C.C.'s assertion of authority over the states' sphere of intrastate jurisdiction.

Section 152(b) states that:

> . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . .

47 U.S.C. §152(b).

Section 221(b) states that:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. §221(b).

Jurisdiction over intrastate rates, services, charges and practices is left to the exclusive jurisdiction of the states when they are "separable from and do not substantially affect the conduct or development of interstate communications." *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787, 793 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1977).

Section 220(h) even permits the F.C.C. to " . . . except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates", so that companies like Bell will not have to maintain two sets of records. Appendix, p. A-73.

Finally, Section 220(j) authorizes the F.C.C. to *apply to Congress* for additional authority if it finds such authority necessary to "harmonize the powers of the Commission and of State commissions . . . ." Appendix, p. A-73.

Thus, it is clear that Congress intended to establish a dual scheme of concurrent regulation, one with jurisdiction over interstate telecommunications, and one with jurisdiction over intrastate telecommunications. The Preemption Ruling violates this Congressional intent.

Any question of whether the F.C.C. could even arguably assert jurisdiction over depreciation rates of the Bell operating companies *after divestiture* has been answered by *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D. D.C. 1982), *aff'd*, ____ U.S. ____, 75 L.Ed.2d 472, 103 S.Ct. 1240 (1983).

As a result of that decision, commonly referred to as the Modification of Final Judgment (MFJ), the Bell operating companies, including Southwestern Bell, were, as a matter of law, stripped of their previous identity as an interstate telecommunications carrier and reconstituted as a provider of purely local telecommunications service. Southwestern Bell is now a purely intrastate entity.

Furthermore, post-divestiture Bell conforms to the definition of a "connecting carrier". A "connecting carrier" is defined in 47 U.S.C. §153(u) as a carrier described in clauses (2), (3), or (4) of 47 U.S.C. §152(b). These clauses read as follows:

> nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this

> title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. §152(b).

Therefore, with the exception that its tariffs conform to the legal requirements of sections 201 through 205 of the Communications Act, a "connecting carrier" is not subject to F.C.C. jurisdiction for accounting and depreciation purposes.

The F.C.C.'s accounting and depreciation regulations apply only to carriers subject to the Act. 47 U.S.C. §220. Carriers subject to the Act can only be "common carriers" as defined in 47 U.S.C. §153(h) because the definitions of "common carrier" and "connecting carrier" are mutually exclusive. *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701, 705 (1st Cir. 1977). In fact, long ago the F.C.C. ruled that all such "connecting carriers" were exempt from its jurisdiction except for the requirements in sections 201 through 205. *See, Rochester Telephone Corporation v. United States*, 307 U.S. 125 (1939); and *Classification of Telephone Companies*, 3 F.C.C. 37 (1935).

The MFJ became effective January 1, 1984, resulting in the breakup of the Bell System. As a result, all of the Bell operating companies and their assets were divested into legally separate and distinct corporations to be held by seven regionally based holding companies.

After the effective date of divestiture the Bell operating companies were prohibited by law from carrying longhaul toll traffic, i.e., toll traffic, interstate or intrastate, that crosses administrative boundaries approved by the Court, known as local access and transport areas or LATA's. Therefore, under the MFJ, the Bell operating companies can offer only *intrastate* toll service which does not cross the boundaries of any LATA.

Southwestern Bell's only contact with interstate or even interLATA calls, after divestiture, is their physical connection

to the facilities of *another carrier* (e.g., AT&T, or MCI) with which Bell has *no affiliation.*

In *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, ____ U.S. ____, 76 L.Ed.2d 1, 103 S.Ct. 1905, 52 PUR4th 514 (1983), this Court held that the A.P.S.C. could regulate wholesale rates of a customer-owned rural electric cooperative. In so ruling this court stated that:

> state regulation . . . is well within the scope of "legitimate local public interests" particularly considering that *although AECC is tied into an interstate grid, its basic operation consists of supplying power from generating facilities located within the State to member cooperatives, all of whom are located within the State.* [Emphasis supplied.]

52 PUR4th at 525.

Similarly, Southwestern Bell's basic operations consist of providing local telecommunications services although it is physically tied into an interstate grid. For Bell to assert that it provides "interstate" services is to openly admit being in violation of the MFJ.

The Preemption Ruling and its enforcement by the numerous Bell operating companies have invaded and disrupted the ratemaking authority expressly reserved to the states by the Communications Act. The Preemption Ruling on its face is an action in excess of and contrary to the F.C.C.'s enabling legislation. The District Court below made no evaluation or examination of any rulemaking or adjudicatory record. It merely looked at the face of the Preemption Ruling and found that it exceeds the F.C.C.'s statutory jurisdiction and is therefore unenforceable.

It is in the national interest that this Court address the jurisdictional validity of the Preemption Ruling and resolve the numerous and conflicting state and federal court controversies surrounding this issue.

c. This Case Presents a Conflict in Opinions Rendered in the First and Eighth Circuits.

In addition to the numerous pending federal cases mentioned previously, the First and Eighth Circuit Courts of Appeals have issued opinions squarely in conflict with one another on the enforceability of the Preemption Ruling.

The Eighth Circuit has held that the Preemption Ruling is a "self executing order of an administrative agency . . . which is accorded the same preemptive effect as a federal statute" and that it is enforceable by a private party like Bell. Appendix, p. A-53.

On June 29, 1984, the First Circuit Court of Appeals, in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine, supra*, held that the Preemption Ruling is not an "order" within the meaning of 47 U.S.C. §401(b) (Appendix, p. 50a), and therefore not enforceable under that statute. Furthermore, the First Circuit found that the Preemption Ruling is not enforceable by a private party. Appendix, p. A-70.

The First Circuit analyzed the proceedings leading up to the issuance of the Preemption Ruling and determined that it resulted from a rulemaking docket wherein the F.C.C. consolidated a petition for a declaratory ruling from

an Ohio telephone company.* Therefore, the Preemption Ruling is a "rule" as a matter of law, and, as such, enforceable by the F.C.C. only. Appendix, p. A-56.

Petitioner submits that the Eighth Circuit erred in presuming that the Preemption Ruling constitutes an "order" within the meaning of 47 U.S.C. §401(b) merely because it was "regular" in a purely procedural sense.

The First Circuit correctly observed the admonition of this Court in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 86 L.Ed. 1563 (1942), that " . . . [t]he particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." 316 U.S. at 416.

Under this authority the District Court had jurisdiction to initially determine whether the Preemption Ruling was "regularly made", in substance as well as procedure, under 47 U.S.C. §401(b). By adopting the position that the District Court was limited to a review of only the procedural regularity of the F.C.C. ruling, the Eighth Circuit violated the *C.B.S.* doctrine and arbitrarily prevented the

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*The Eighth Circuit's decision (Appendix, p. 38a) creates confusion about the A.P.S.C.'s status during the F.C.C. proceeding which is now on appeal before the Fourth Circuit. *Virginia State Corporation Commission v. F.C.C.*, No. 83-1136 (4th Cir. June 18, 1984). That proceeding began as a rulemaking docket. Arkansas and other states submitted comments as is customary in a rulemaking (as opposed to an adjudicatory) proceeding. However, the F.C.C. consolidated this rulemaking proceeding with an adjudicatory proceeding involving an Ohio telephone company. The A.P.S.C. never became a party to that adjudication. Thus, the A.P.S.C. is not subject to an attempted enforcement action. For that reason, no stay was sought by the A.P.S.C. or any other state commission not involved in the Ohio adjudication. The Arkansas Commission intervened in the Fourth Circuit appeal to challenge a rule. The attempted enforcement by Bell of that rule as an adjudicatory order does not transform the original rulemaking procedure into an adjudicatory order binding on nonparties like the A.P.S.C.

District Court from making its own determination as to whether the agency's ruling is enforceable under §401(b). That is, if the Preemption Ruling was not jurisdictionally authorized under the Communications Act (as the District Court so found) the District Court had no jurisdiction under §401(b) to enforce it.

The Eighth Circuit's position, then, has the obvious effect of depriving district courts of the authority to determine their own jurisdiction to grant the relief prayed for. This limitation on the district courts is violative of the well established rule that a court must, on its own motion, determine that it has jurisdiction over the case before it. *Minnesota v. Hitchcock*, 185 U.S. 373, 46 L.Ed. 954, 22 S.Ct. 650 (1902).

Here, the application by the Eighth Circuit of this unprecedented restriction on a fundamental power of district courts results in the erosion of a long reserved right of the states. In essence, a federal agency has been allowed to use the federal courts to rubber-stamp its ultra vires act. This clearly violates the safeguards which an independent federal judiciary is intended to provide.

CONCLUSION

For all the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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DATED: September 25, 1984

APPENDIX

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 82-581
32609

In the Matter of	)	
	)	
Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment.	)	CC Docket No. 79-105 *RM-3017*
Petition for Declaratory Ruling on Question of Federal Pre-emption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies.	)	

MEMORANDUM OPINION AND ORDER

Adopted: *December 22, 1982* Released: *January 6, 1983*

By the Commission: *Commissioner Fogarty issuing a separate statement.*

1. The Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System Operating Companies (AT&T).

AT&T seeks reconsideration of the Commission's decision in *Amendment of Part 31*, 89 FCC 2d 1094 (1982) (hereinafter cited as *Preemption Order*), in which the Commission determined that Sections 220(a) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 220(a) and 220(b), did not preempt state commissions from applying different accounting and depreciation procedures for purposes of intrastate ratemaking proceedings.[1] The *Preemption Order* was a reconsideration of *Amendment of Part 31*, 85 FCC 2d 818 (1981) (hereinafter cited as *Expensing Order*).

2. The Commission also has before it a Petition for Declaratory Ruling filed on June 7, 1982, by General Telephone Company of Ohio (GTE of Ohio). This petition requests that the Commission preempt an order of the Public Utilities Commission of Ohio (Ohio) that denied GTE of Ohio the same depreciation rates for intrastate purposes as had been prescribed by this Commission. GTE of Ohio contends that Section 220(b) established the rate prescribed by the Commission as the only depreciation rate the company could utilize.

3. The Commission established a joint reply period for the two petitions, utilizing the pleading cycle for comments in response to the Petition for Reconsideration, and allowed parties to cross-reference their pleadings where appropriate. In addition to pleadings filed by the petitioners and the GTE parties, comments or reply comments were filed by the Arkansas Public Service Commission (Arkansas), Ohio, the People of the State of California and the Public

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[1] On June 8, 1982, GTE Service Corporation, on behalf of itself, United Telephone System, Inc., and Continental Telecom, Inc. (hereinafter referred to as GTE), filed a Petition for Clarification of the Commission's *Preemption Order*. This petition was dismissed as untimely. *Amendment of Part 31*, Mimeo No. 4766 (released June 24, 1982). However, the Commission stated that it would consider the substance of the petition in connection with AT&T's petition.

Utilities Commission of the State of California (California) the Virginia State Corporation Commission (Virginia), the National Association of Regulatory Utility Commissioners (NARUC), the United States Independent Telephone Association (USITA), the Office of Consumers' Counsel, State of Ohio (Consumers' Counsel), and the United Telephone System Inc. and the Idaho Public Utilities Commission (Idaho). A summary of the comments is contained in Appendix A. Below we consider the issues raised on reconsideration, after which we shall consider the question presented by GTE of Ohio's Petition for Declaratory Ruling.

I. *Background*

4. In *Docket No. 19129*, 64 FCC 2d 1, 54-56 (1977), we concluded that it would be desirable to have the causative rate payer bear the costs associated with station connections. We directed AT&T to file a plan for accomplishing this objective. Following AT&T's submission we initiated this proceeding, albeit with a somewhat different approach for modifying the accounting for station connections than proposed by AT&T.

5. After reviewing the comments, we concluded that the drop, block and protector portion of station connections should not be included in any accounting or regulatory revisions. We also concluded that our objective of placing the costs of station connections on the cost causative customer could not be achieved by means of an accounting change alone. This is so because costs associated with the provision of inside wiring must be apportioned between the federal and state jurisdictions as long as inside wiring is provided as a tariffed service subject to dual jurisdiction. Complete unbundling could be achieved by requiring inside wiring to be provided on a detariffed basis, as was done with customer premises equipment. Accordingly, we initiated a further inquiry to explore the detariffing concept further, *Amendment of Part 31*, 86 FCC 2d 885 (1981).

6. Nevertheless, we concluded that changes in accounting and depreciation procedures that would begin expensing the inside wiring portion of the station connection account would be in the public interest, and would facilitate the deregulation of the provision of inside wiring if the Commission should later decide to take that approach. The principal changes required that future costs of installing inside wiring and similar costs be included as an expense in Account 605, Repair of Station Equipment. Such costs were previously capitalized in Account 232, Station Connections. The expensing of these costs would be phased in over a four year period unless a carrier obtained state commission approval to expense one hundred percent immediately. The *Expensing Order* also required that the present net investment in inside wiring and the investment capitalized during the phase-in period be amortized over a ten year period. These expensing and amortization rules replaced the depreciation procedures that had previously applied to the inside wiring portion of the station connections account.

7. On reconsideration, we concluded that the *Expensing Order* was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate ratemaking proceedings, unless such preemption occurs as a matter of law. Our discussion was based in part on an assumption that most or all of the state commissions would follow our lead. We also indicated that Section 220 does not preclude state commissions from departing from accounting and depreciation rules prescribed by this Commission for purposes of regulating intrastate communications services. In reaching this conclusion, we reviewed Section 20(5), the Interstate Commerce Act predecessor of the accounting and depreciation provisions contained in Section 220. We concluded that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate. We stated:

> [i]nasmuch as Section 20 had never been construed to restrict state commissions from requiring carriers to keep additional records for purposes of intrastate ratemaking and court decisions in analagous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict state commissions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Preemption Order, supra at 1102.

8. We also reviewed the legislative history of the Communications Act and concluded that Congress had been uncertain of the preemptive effect of reenacting the Interstate Commerce Act language and that it apparently did not want to resolve the question at that time. We concluded that Congress had been attempting to obtain as much uniformity as possible without coercing any state commission to use ratemaking methods which it might find unacceptable. We found that we had proceeded in a manner consistent with this purpose for nearly four decades, noting that we had recognized divergent practices by state commissioners from time-to-time. The language of Section 2(b)(1) was found to support the interpretation that state commissions are not precluded from applying different accounting and depreciation procedures from this Commission. The *Preemption Order* concluded by finding that nothing in the Act precluded us from preempting state commission actions that might interfere with or tend to frustrate policies or rules we have adopted to carry out statutory objectives with respect to interstate or foreign communications, but we also found that federal regulation would not be frustrated if carriers maintain additional records for intrastate ratemaking purposes.

II. *Discussion*

9. The question presented in the reconsideration petition is a clearly delineated controversy over whether Sec-

tion 220(b) preempts state depreciation prescriptions that are inconsistent with the rates prescribed for classes of property by this Commission, or, whether Section 2(b)(1) or Section 221(b) reserve to the states the right to prescribe their own depreciation rates for intrastate regulatory purposes. Alternatively, it is argued that the Commission should preempt inconsistent state depreciation rates pursuant to its authority to preempt state actions which would frustrate or interfere with the accomplishment of federal objectives. *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*). The *Preemption Order* was the first time the Commission had squarely addressed the preemptive effect of a prescribed depreciation rate, despite having prescribed rates for more than thirty years. No federal court has addressed the question of the preemptive effect of a Commission prescribed depreciation rate.[2]

10. It is argued that the Commission erred in the earlier decision by concentrating on Sections 220(a) and 220(g) rather than properly analyzing Section 220(b), the provision dealing directly with depreciation. A careful review of AT&T's and GTE's pleadings and a thorough reevaluation of the entire question of the Commission's depreciation jurisdiction leads to the conclusion that the evaluation in the *Preemption Order* did not sufficiently consider the effect of Section 220(b). Accordingly, we shall undertake to evaluate anew the scope of the Commission's jurisdiction under Section 220(b).

11. Before turning to the analysis of the statutory provisions, it is necessary to understand the relationship

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[2] The United States Supreme Court has held that state commissions may prescribe depreciation rates where the empowered federal commission has not prescribed rates. *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm.*, 297 U.S. 471 (1936). The Court specifically reserved judgment on the effect of prescribed rates by the federal commission.

between capitalizing and expensing a transaction or economic event. When an event is capitalized, its cost is recorded on the company's books to be recovered over some future period through depreciation charges to operating expense. Depreciation as used here is an accounting convention for allocatively spreading the original cost, less net salvage, over the useful life of a capital asset. Thus, for there to be depreciation there must be costs that are to be recovered over more than one accounting period. However, when the decision to expense is made, all costs are to be recovered at one time. Thus, the decision to expense is a determination that there is no category of asset for which depreciation expense will be allowed. It is therefore clear that the decision to commence expensing the inside wiring portion of station connections involves questions of depreciation policy.

12. The law is clear that federal regulation should not be presumed to preempt state regulations without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Our review reveals that both criteria are satisfied in this case. In reaching this conclusion we analyzed the language of Section 220, the legislative history, relevant court cases, and our regulatory objectives.

A. *Statutory Language*

13. The Commission's express jurisdiction with respect to depreciation is set forth in Section 220(b). That section provides:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of deprecia-

> tion which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

14. The plain language of the statute is express and unequivocal. Section 220(b) says the Commission "shall" make depreciation prescriptions, and that carriers "shall not" charge depreciation different than that prescribed by the Commission. That this preempts inconsistent state action is further indicated in Section 220(h) which gives the Commission discretion to "except" carriers from the requirements of Section 220 "where such carriers are subject to state commission regulation."

15. The requirement of Section 220(i) that states be given an opportunity to comment before the Commission prescribes "any requirements as to accounts, records and memoranda" is consistent with an interpretation that states are preempted when the Commission has acted in the depreciation area. By providing that states be given notice, Congress ensured that state needs for accounts, records and memoranda brought to the Commission's attention would be considered. Such a procedure assures that the states' needs and legitimate interests are met.

16. In setting the duties of the Commission and the prohibitions on the carriers subject to the Act, Congress spoke of depreciation in general terms without any attempt to make distinctions between either "intrastate" or "interstate" property. This is significant because when Congress wanted to make such distinctions in the Act it did so. See, *e.g.*, 47 U.S.C. 221(c) and (d), and 410(c). The fact that Congress did not make such a distinction here indicates that it intended no distinction.

17. Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practices in form only, allowing the states to treat substantive depreciation matters as they might choose. While that might be a plausible construction of Section 220, after full analysis we do not believe that Congress intended such a feeble gesture. There would be little purpose to require the carriers to keep all their books pursuant to an FCC prescription, and then allow the states to require the carriers to follow inconsistent depreciation practices. Instead, the language of the section and the comprehensive treatment given to this matter by the Congress demonstrate that more was intended. Accordingly, we find that the statutory language indicates that FCC depreciation prescriptions are to be followed in both the federal and state jurisdictions unless the FCC provides otherwise. As demonstrated below, this construction is also consistent with the legislative history.

B. *Legislative History*

18. In the *Preemption Order* we found that the legislative history of Section 220 was inconclusive and at most indicated that Congress was "not sure" about the

preemptive effect of the new legislation. 89 FCC 2d at 1106. However, the reconsideration petition and comments supporting it show that Congress believed that the language ultimately adopted would preempt the states from prescribing depreciation rates for subject carriers when the Commission had prescribed rates.

19. In our *Preemption Order*, we observed that Section 220 of the Communications Act had been adopted from Section 20 of the Interstate Commerce Act, and our review of the few ICC cases touching upon preemption did not reveal the ICC to have possessed the kind of broad preemptive power now urged by GTE and AT&T. However, after reviewing the pre-1934 cases again, we find that, while not dispositive, they lean more toward GTE and AT&T's views than against them.

20. The closest the ICC came to delineating its position on this matter came in *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295, 332 (1926), where it said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

In the *Preemption Order* we focused on the fact that the ICC had not actually prescribed depreciation rates and thus there was uncertainty regarding the ICC's actual authority. However, after reviewing that case again we find that the better and more sensible interpretation is that if the ICC had prescribed depreciation rates, the state commissions would have been precluded from prescribing rates that diverged from those it prescribed. We cited *Smith v. Il-*

linois Bell Tel. Co., 282 U.S. 133, 159 (1930), in the *Preemption Order* as supporting our conclusion that the ICC decision did not preempt the states. In that decision the Supreme Court held that absent ICC action prescribing depreciation rates, Section 20(5) did not preclude states from prescribing depreciation rates. Since the ICC proceeding did not actually prescribe depreciation rates, but only began a proceeding looking toward the ultimate prescription of depreciation rates, there were no depreciation rates prescribed that could have preempted state-prescribed depreciation rates. Thus *Smith* only stands for the proposition that until the ICC actually prescribed rates, there was no basis for preempting the states. It did not reach the question of whether Section 20(5) would preempt the states if the ICC prescribed depreciation rates. [3]

21. At the hearings pertaining to the Communications Act the then chairman of the ICC indicated his belief that the ICC depreciation rulings would govern both federal and state depreciation practices:

> Paragraph (j) . . . should be most carefully considered. It unquestionably directly conflicts with, and destroys the uniformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law. [4]

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[3] Similarly, *Interstate Commerce Commission v. Goodrich Transportation Co.*, 224 U.S. 194 (1912) and *Kansas City Southern Ry. Co. v. I.R.S.*, 52 F.2d 372 (8th Cir. 1931) do not appear to have any pertinance to the issue at hand. As noted in 89 FCC 2d at 1099, *Goodrich* did not raise any question with respect to the effect of ICC accounting rules upon activities not subject to ICC rate regulation. The *Kansas* holding simply reconciles two federal statutes, the Internal Revenue Code and the Interstate Commerce Act. It did not purport to establish new law on state preemption.

[4] Ltr. of F. McManamy, Hearings on S. 2910, p. 208.

22. Other witnesses who appeared at the hearings repeated the same view. See statements of Mr. Gifford, [5] Mr. Benton, [6] and Dr. Irvin Stewart. [7]

23. The *Preemption Order* relied heavily on the "silence contained in the Congressional Reports," 89 FCC 2d 1105, in concluding that the legislative history did not support a finding that Section 220 was intended to preempt state commissions from prescribing their own depreciation rates for intrastate purposes. However, a reexamination of the legislative history in light of the comments on reconsideration indicates that the committee reports accompanying the bills did contain language indicating that the committees believed that the predecessor provision had preempted the states. The House Report, in discussing the Section 220(j) provision (which was not adopted) that would have reserved jurisdiction over depreciation rates to the states for purposes of intrastate ratemaking, stated that the provision was "responsive to the requests of the State commissions that the present law be *changed so as to permit* those bodies to exercise, for State purposes, certain jurisdiction over . . . depreciation accounting." [8]

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[5] Hearings on H.R. 8301, pp 191-192 (See 89 FCC 2d at 1105, fn.17). The *Preemption Order* had indicated that Mr. Gifford's preemption views were tentative. However, careful review of that testimony reveals that Mr. Gifford's uncertainty may have concerned the date Section 20(5) was enacted, not preemption.

[6] Hearings on S. 2910, 73rd Cong., 2d Sess., p. 181 (1943).

[7] Hearings on H.R. 8301, 73rd Cong., 2d Sess., p. 17 (1934).

[8] H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934) (emphasis added). The section (j) proposed by the House would have provided: "Nothing in this section shall (1) limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State Law." H.R. 8301, 73rd Cong., 2d Sess. Section 220(i) (February 27, 1934).

24. In remarks on the House floor, Representative Rayburn, Chairman, House Committe on Interstate and Foreign Commerce explained Section 220 of the proposed bill as follows:

> [p]aragraphs (a) to (g), relating to accounts records, memoranda, and depreciation, is based upon sections 20(5) to (8) of the Interstate Commerce Act with *changes necessary to permit State commissions to prescribe* the systems of accounts for the intrastate operation of carriers. Paragraphs (h) to (j) are new . . . *paragraph (j) removes any limitation upon the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction, rates of depreciation.* The last three paragraphs named were placed in the bill at the request of the State commissions which feel that their task of regulating intrastate communications will be greatly facilitated by the adoption of these paragraphs.[9]

25. The Senate version of Subsection (j) took a totally different approach than the House version. It called "for investigation and report to Congress instead of immediately turning over these matters to the State." S. Rep. No. 781, 73rd Cong., 2d Sess. 5 (1934).[10] The version of Section 220(j) finally enacted was the result of agreement in the conference committee. The conferees agreed to adopt the House provisions as to Sections 220(h) and (i), but decided against the House Section 220(j) proposal to remove any limitation upon the power of states to prescribe rates of

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[9] 78 Cong. Rec. 10314 (1934) (emphasis added).

[10] The Senate version of Section 220(j) provided: "The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State Law, to prescribe their own percentage rates of depreciation or systems of accounts records, or memoranda to be kept by carriers." S. 3285, 73rd Cong., 2d Sess. Section 220(j) (March 28, 1934).

depreciation. Instead, Section 220(j) was modified along the lines of the Senate proposal to require the Commission to "investigate and report to Congress as to the need for legislation to define or further harmonize the powers of the Commission and of State commissions with respect to other matters to which this section relates." Conf. Comm. Rep. No. 1918, 73rd Cong., 2d Sess. 17 (1934). The obvious inference to be drawn is that the conferees were not prepared at that time to allow the states to prescribe depreciation rates different than those established at the federal level, but that matter might be considered later if the report required by Section 220(j) indicated it to be appropriate.

26. The hearing testimony and Committee reports therefore indicate that the language being recodified from Section 20(5) of the Interstate Commerce Act preempted the state commissions' jurisdiction over depreciation. The rules of statutory construction provide that where Congress reenacts a provision from an existing statute, it intends that the construction applicable to the existing provision apply as well to the new provision.[11] The legislative history thus supports the actual language of Section 220(b) and indicates that Congress intended to preempt state commission jurisdiction over depreciation rates for subject carriers when it recodified the language from the Interstate Commerce Act. Accordingly, we conclude that the analysis of the legislative history contained in the comments of AT&T and GTE accurately represents the intent of Congress and that the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier.

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[11] Courts have given weight to interpretations of the Interstate Commerce Act in interpreting the Communications Act. See, *e.g.*, *American Telephone and Telegraph Company v. FCC*, 487 F.2d 865 (2d Cir. 1973).

C. *Administrative and Court Decisions*

27. The *Preemption Order* cited *Accounting Rules for Telephone Companies*, 203 ICC 13 (1934), as evidence that the FCC could not preempt state depreciation practices. There the ICC recognized that states might have additional accounting needs and indicated that it had permitted state-prescribed sub-accounts within the federally-required books of account. However, the adoption of a blanket subdivision rule does not lead to the conclusion that federally adopted accounting and depreciation rules are not preemptive. Rather, it reflects an awareness that state commissions may have special data requirements to properly administer their regulatory policies which may require additional detail beyond that prescribed by the federal agency. A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest. Any other policy would obliterate the prescriptive effect of our adoption of a uniform system of accounts.

28. In fact we have approved variations from the prescribed uniform system of accounts. For example, our rules give carriers blanket authority to subdivide certain prescribed accounts "provided such subdivisions do not impair the integrity of the accounts prescribed." 47 C.F.R. 31.01-2(d)(1). C.F. 31.01-2(f), authorizing carriers to subdivide accounts "in the manner ordered by any state commission having jurisdiction...." We also have approved state commission rate making treatment of plant under construction different from that adopted by us. See 89 FCC 2d at 1107.

29. There may well have been some instances of inconsistent state treatment of depreciation in the past.

However, we do not seek controversy unless it is necessary to protect vital federal interests. Either such instances did not come to our attention or they may not have appeared threatening to federal interests.[12] In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, No. 80-1471 (D.C. Cir. November 12, 1982). As discussed, *infra.*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers. *See* para. 14 above.

30. Nor is there any merit to the argument that federal preemption of depreciation practices constitutes intrastate ratemaking which might run afoul of 47 U.S.C. 152(b). Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services. In any event, Section 2(b) of the Act, 47 U.S.C. 152(b), has a well defined purpose which would not be

[12] *Pacific Telephone and Telegraph Company v. California*, 401 P. 2d 353 (1965), was cited in the *Preemption Order* to support nonpreemption. However, the California Supreme Court did not analyze Section 220(b) or its legislative history and its determination is therefore unpersuasive.

implicated here: "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *NCUC I, supra* at 794 n.6. Here the setting of depreciation rates is not an essentially local incident or practice and it has substantial effects upon the administration and development of the interstate telephone network. [13]

D. *Preemption Under Federal Supremacy*

31. Even if one were to assume that Section 220(b) did not automatically preempt the states whenever this Commission has acted, federal preemption of inconsistent state depreciation would be justified in this case to avoid frustration of validly adopted federal policies. The Fourth Circuit has stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.

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[13] Nor is federal preemption of depreciation practices inconsistent with 47 U.S.C. 221(b).
Section 221(b) was intended to reserve state jurisdiction over exchange rates where exchange boundaries extend over two states. That provision was not intended to create new reservations to the states beyond that contained in Section 2(b) and the narrow circumstance encompassed by interstate exchanges. See *Computer and Communications Industry Association v. FCC, supra*, and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*).

NCUC I, supra at 793. To the same effect, see *Computer and Communications Industry Association v. FCC, supra* at 35.

32. The D.C. Circuit recently addressed the preemption question, observing:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle [is that]...preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy.

Id. at 38. The court went on to find that conflicting state regulation may be preempted even though there is some indirect effect on state ratemaking discretion, noting:

> the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and (b) of the Act allocate federal and state authority with regard to both "charges [and] . . . facilities." Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

Id. at 38-39.

33. The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. 151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would

frustrate the accomplishment of that policy and are preemptable by this Commission.

34. Over the past decade the Commission has embarked in several areas of telecommunications to pursue a policy of encouraging competition wherever the market conditions will support such a policy and produce benefits to the public interest. In *MTS-WATS Market Structure Inquiry*, 81 FCC 2d 177 (1980), the Commission opened the domestic MTS-WATS market to competitive entry, reserving the question of entry to Alaska to a later phase since concluded with the adoption of a similar open entry policy, *MTS-WATS Market Structure Inquiry*, FCC 82-515 (released November 30, 1982). In *Computer Inquiry II*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *recon.*, 88 FCC 2d 512, *aff'd sub nom., Computer and Communications Industry Association v. FCC, supra*, the Commission opened the areas of enhanced services and customer premises equipment to competitive provision. These are just two examples of the policies which the Commission has pursued. However, they do point up the fact that if this policy is to be successful, it will be necessary for the market place to operate efficiently. Such efficient operation requires proper price signals generating from supply and demand conditions.

35. Capital recovery is an important determinant of the price at which services can be offered and significantly affects the amount of facilities provided to supply the needs of the communications industry. In *Amendment to Part 31*, 83 FCC 2d 267 (1980), *recon.*, 87 FCC 2d 916 (1981), the Commission adopted remaining life and straight line equal life group depreciation methods that recover capital on a basis that approximates straight line unit depreciation more closely than did the previously used methods. More timely capital recovery was anticipated to result in faster technological innovation with its accompanying benefits of more efficient service provision and lower costs resulting from more productive use of facilities.

36. Capital recovery issues are important in the implementation of *Computer Inquiry II* due to the part depreciation plays in the determination of net book value and the resultant gain or loss that may occur on the transfer of assets to the new subsidiary. It will also be significant in any later transfer of assets from the provision of regulated service to unregulated service or vice-versa. Thus, appropriate capital recovery will ease the regulatory burdens associated with supervising the transition to the new structure.

37. Depreciation is a significant portion of the revenue requirement of the regulated telephone companies. As such, it plays an important role in determining the price at which they offer their services. If competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market. Absent such depreciation levels, improper signals will be given to the market. Since most plant is used interchangeably to provide interstate and intrastate communications service, supply and demand is determined by the combination of inputs from service demand in both regulatory jurisdictions. Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually

evolving competitive telecommunications marketplace.[14] Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

38. NARUC contends that preemption with respect to station connections is unnecessary and will not produce competitive benefits because expensing is not the same as unbundling. While NARUC is correct in a strict sense, it avoids the critical issue, which is the proper timing of cost recovery. If the Commission preempts with respect to station connections and all states must expense these costs, current ratepayers will be paying these costs instead of future ratepayers as would be the case with capitalization. Thus, future prices will reflect the appropriate costs for providing those services. Moreover, if these costs are expensed and state commissions must allow rates to cover these costs, it is likely that the cost causative ratepayer will in many cases be charged for the costs being expensed in connection with the provision of inside wiring. Thus, the Commission's objective may be substantially achieved by preempting state commissions from departing from our expensing rules.

39. In 1971 Congress amended the Communications Act to change the procedures for allocating costs between federal and state jurisdictions by adding Section 410(c). The

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[14] AT&T and GTE indicate several state commissions have refused to follow, have indicated an intent not to follow, or are being urged not to follow Commission determinations with respect to the expensing of inside wiring and/or the adoption of straight-line equal life group or remaining life depreciation methods. A staff review of state action in conjunction with AT&T intrastate tariff proceedings reveals that all but two states have approved expensing of station connections, that 13 states have rejected and 12 have approved equal life group depreciation, and that 9 states have rejected and 22 have approved remaining life group depreciation. Prior to issuing our *Order* in this docket we did not expect that such significant variance would be required by states.

Commission was given the ultimate authority with respect to such allocations, further solidifying its superintendency over common carrier communications. See *NCUC I, supra* at 795. Section 410(c) procedures provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment. The utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace. Several parties suggest that under or over recovery will result from one jurisdiction or another because of the shifting usage patterns for telephone plant over time and argue that if such a result were to occur, significant inequities would result to both ratepayers and carriers. A uniform depreciation rate for each class of property applicable to all property whether allocated to the federal or state jurisdiction clearly eliminates these potential problems.

40. For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission prescribed depreciation rates and practices. Accordingly, it is essential to preempt inconsistent state depreciation practices to avoid frustration of these vital national policies.

III. *Declaratory Ruling Petition.*

41. GTE of Ohio seeks to have the Commission preempt an order of the Ohio Public Utilities Commission that did not approve remaining life and equal life group rates for intrastate ratemaking purposes. As alleged by GTE of Ohio, the differential in rates amounts to seven million dollars per year. GTE of Ohio states that failure of this Commission to preempt the state will frustrate the achievement of federal policies adopted by this Commission. Its argument is similar to those cited in connection with the reconsideration petition.

42. Essentially the same arguments are made against the GTE of Ohio petition as were urged on reconsideration with regard to the substance of the issue. However, Ohio cites an Ohio statute that precludes the state commission from adopting remaining life depreciation for intrastate purposes.

43. One procedural argument is raised by Ohio with respect to the petition. It contends that the question presented is premature since the order is subject to further reconsideration before the Ohio Commission pursuant to a request filed by GTE of Ohio. We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required, *NCUC I, supra* at 790-1. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsideration proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void. The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. Both must fall in the face of overriding federal concerns and policies.

IV. *Conclusion*

44. We have carefully reviewed the record upon reconsideration. The issues raised concerning the *Preemption Order* caused us to reevaluate the statutory language of Section 220(b), the legislative history of the provision, and the relevant judicial and administrative proceedings

relating to the subject. Our considered judgment after this review is that the *Preemption Order* must be reconsidered. We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates. Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein. Moreover, they must follow the amortization procedures adopted in that decision for the embedded inside wiring and any additions to the capitalized amount as a result of the phase-in of the expensing of inside wiring.

45. Even if Section 220(b) does not preempt state commissions, we would act under our authority to preempt state actions that interfere with the accomplishment of federal policies and objectives. *Computer and Communications Industry Association v. FCC, supra*, and *NCUC II*. We note that petitioner and the parties supporting the petition cite several states that have indicated they do not intend to follow the Commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

46. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 220(b) of the Communications Act of 1934,

as amended, 47 U.S.C. 151, 154(i), and 220(b), That the Petition for Reconsideration filed by the American Telephone and Telegraph Company IS GRANTED.

47. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by General Telephone Company of Ohio IS GRANTED to the extent reflected herein.

48. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the Federal Register.

49. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION*

William J. Tricarico
Secretary

**See attached separate statement of Commissioner Joseph R. Fogarty.*

Appendix A. Summary of Comments

1. AT&T argues that the Commission on reconsideration should find that state commissions are precluded from departing from the depreciation methods and rates established by this Commission in order to allow the carriers to achieve timely capital recovery. It views the *Premption Order* as a retreat from the Commission's competitive policies.

2. AT&T asserts that realistic depreciation rates are essential to attain accurate cost-based pricing decisions to prevent artificial barriers to competition, to foster technological innovation which will enhance network efficiency and the availability of competitive alternatives, to

facilitate the timely implementation of detariffing of customer premises equipment [1] and to insure the financial viability of the carriers. It contends that competitive conditions result in faster obsolescence and shorter asset lives, requiring that depreciation methods and rates be inseparable from ratemaking to insure capital recovery.

3. AT&T proposes two legal theories for preempting state commission action. First, it asserts that the Commission may preempt under Sections 1 and 2 of the Act, citing *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), *NCUC II*, *NCUC I*, and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). It states that because of the central role depreciation, including the depreciation aspects of station connections, plays in the achievement of the Commission's policies, preemption is necessary to avoid interference with or frustration of these policies.

4. AT&T's second theory is that Section 220(b) preempts states on its face, asserting that in its earlier pleadings it did not rely on Section 220(g) as suggested by the Commission's decision. It argues that Section 220 gives the Commission discretion with respect to accounting rules, but does not give it such discretion with regard to depreciation prescriptions. AT&T states that the Commission's rule allowing carriers to subdivide an account to comply with a state commission order does not mean that a state can require capitalization when this Commission requires expensing. Finally, it submits that the Commission misread the legislative history of the Communicationns Act by failing to consider statements in the committeee reports and remarks of members at committee hearings that indicate Congress believed the Interstate Commerce Act provisions

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[1] It contends that different depreciation rates between jurisdictions will result in disagreements about net book value in deregulating CPE and that the application of the Separations Manual will create uncertainty as to which plant a particular book value relates.

from which Section 220(b) was taken did in fact preempt the states. See also *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926).

5. GTE asserts that the Commission's policies in the areas of competition and faster capital recovery will be frustrated if the state commissions are allowed to depart from the depreciation rates and methods prescribed by the Commission. It contends that Section 220(b) preempts the states annd distinguishes Section 220(a) as being discretionary on the Commission and argues that the Commission focused only on the provisions of Section 220(a) in its earlier decision. It submits that there is no doubt that a state can require a carrier to keep additional records and memoranda. However, GTE argues that the Commission's decision is overly broad. It is clear, GTE contends, that the Commission can preempt inconsistent state action when it conflicts with national telecommunications policies, and it should do so in this case. GTE also argues that the legislative history and the rules of statutory construction indicate that Congress intended to preempt the states in the area of depreciation, submitting that property cannot be successfully depreciated at two different rates prescribed by different regulatory bodies because under or over recovery from one or the other jurisdiction will occur from the use of shifting usage factors.

6. The oppositions generally argue that the states have the jurisdiction to determine the extent to which intrastate rates reflect depreciation and expensing adjustments promulgated by the Commission. Sections 2(b) and 221(b) are cited as reserving jurisdiction over local and intrastate telephone rates to the states as intended by Congress when it distinguished between "interstate" and "intrastate" in Sections 1 and 2. Ohio argues that the preemption argument was rejected in the only case of which it is aware, *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965).

7. Ohio asserts that the courts have distinguished between ratemaking and interconnection policies, *NCUC II* and *NCUC I*, and submits that it is the ratemaking jurisdiction reserved to the states that is in question in this proceeding. To permit the Commission to prescribe depreciation rates applicable to all property whether used for interstate or intrastate services would, in Ohio's view, be equivalent to giving the FCC a hand in setting state rates.

8. Ohio is concerned that under some methods, such as remaining life, costs will not be charged to consumers who receive the benefits of the property being depreciated. Finally, it contends that Sections 220(i) and (j) are consistent with concurrent jurisdiction.

9. Ohio argues that GTE is attempting to have the Commission read Section 2(b) out of the Act, and asserts that it is inappropriate to ignore language in a statute, to extend a statute beyond its clear import, or to embrace subjects not specifically enumerated. Section 2(b)(1) is stated by Ohio to have been intended to reverse the Supreme Court decision in *Houston East and West Texas Ry. v. U.S.*, 234 U.S. 342 (1914), wherein the ICC was given the power to suspend intrastate rates enabling carriers to raise intrastate rates to federal levels for similar distances. NARUC and Ohio argue that Section 2(b) was intended to ensure that state jurisdiction was not limited by the 1934 legislation.

10. Several parties assert that there is considerable Commission precedent recognizing the states' independent ratemaking authority, including departures from Commission prescribed accounting, for intrastate rates. They note that the Commission has encouraged state commissions to devote more resources to depreciation matters, *Amendment of Part 31*, 83 FCC 2d 267 (1980) *recon.*, 87 FCC 2d 916 (1981), has recognized in this proceeding the state jurisdiction over expensing of station connections for state ratemaking purposes, has recognized divergent treatment

of interest during construction and has not contested California's use of remaining life for approximately thirty years. Ohio argues that there is nothing to suggest that there needs to be national uniformity in depreciation procedures and that local diversity is desirable, noting that even a GTE of Ohio witness in an Ohio rate case has indicated that local diversity in setting depreciation rates is preferable.

11. Ohio contends that *McDonnell Douglas Corp. v. General Telephone Company of California*, 594 F.2d 720 (9th Cir. 1979), recognized the validity of intrastate regulatory jurisdiction under the Act by finding that Congress in enacting Section 2(b) had intended to give states considerable power with respect to wire communications that are wholly intrastate in nature.

12. California argues that the Commission's refusal to preempt state power to prescribe depreciation rates for intrastate ratemaking purposes will not undermine the Commission's procompetitive policies or signal a retreat since many states have adopted policies that foster competition. AT&T's assertion that preemption must be exercised to promote procompetitive policies is rejected by NARUC as unsupported. It states that expensing of station connection costs can have no competitive effect because expensing is not the same as unbundling. Moreover, it contends that the Commission did not adopt remaining life and equal life group depreciation procedures to promote competition but, rather, to more properly time capital recovery and insure that any deficiency in past depreciation was adjusted. Finally, NARUC states that the speculative statements about the numbers of states that are not following the Commission's policies are inadequate to justify preempting state commission jurisdication on the theory that federal policies are being frustrated.

13. NARUC argues that the attempted distinction of Section 220(a) from Section 220(b) on the basis that Section

220(b) is mandatory while Section 220(a) is discretionary does not address the question of the preemptive effect of either section. It contends that neither reason nor case law provides support for asserting that preemption of state regulation of intrastate communications is automatic with respect to subject areas which the FCC must regulate on the interstate level. It further notes that the language of Section 220(b) does not differ significantly from that in Section 220(g) with respect to the effect of prescribed depreciation rates, accounts or records other than as prescribed by the Commission. NARUC states that the relationship between accounting and ratemaking is self evident and argues that state control over intrastate rates would have little vitality if state commissions were deprived of the power to disallow expenses and depreciation claimed by carriers. NARUC asserts that the fact that a proposed Section 220(j) that would have expressly reserved depreciation prescription powers to the states was not adopted does not mean that states must be bound by Commission depreciation prescriptions, stating that the final provision adopted was a compromise.

14. Consumers' Counsel supports the Commission's *Preemption Order* and generally cites from that *Order* in support of its position. Idaho also agrees with the conclusion of the Order and states that it believes that administrative costs of separate record keeping to meet state requirements will be small. Arkansas filed to indicate that its opinions had not rejected the new depreciation methods outright but had left the decision to individual cases for resolution.

15. AT&T's reply submits that the setting of depreciation rates does not constitute the exercise of jurisdiction with respect to charges for intrastate services. It argues that Section 2(b) does not deprive this Commission of jurisdiction over jointly used property where its regulation affects the conduct or development of interstate

communications. AT&T states that if a state utilized the depreciation rate prescribed by the Commission, it may make adjustments to the test period data to reflect concepts of used and useful property or other pro forma adjustments to reflect conditions during the period during which the tariff will be in effect.

16. AT&T distinguishes *Houston East and West Texas Ry. Co. v. U.S., supra*, by asserting that that case involved actual preemption of service rates. It notes that while Congress may have sought to reverse that decision in the communications field, the issue here is only the jurisdiction to prescribe depreciation rates. Thus, it contends that the case actually suggests that Section 2(b) should be narrowly interpreted. Moreover, while use of federally prescribed depreciation rates may significantly affect intrastate rates, the states remain free to price individual service rates. See *e.g., NCUC I.*

17. USITA submits that federal preemption of jurisdiction over depreciation rate prescriptions for carriers for which the Commission has prescribed depreciation rates would not interfere with state commission ability to set intrastate service rates in accordance with any ratemaking method desired. It contends that the setting of depreciation rates is not a ratemaking function pursuant to Sections 201-205, but is the exercise of a specific power granted to the Commission by Congress. USITA argues that divergent depreciation rates create confusion and raise problems of capital recovery.

18. GTE contends that state action whether in the nature of ratemaking or otherwise which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 50 LW 4916, 4919 (1982). GTE concludes that the states do not have the power through the guise of ratemaking to negate FCC action designed to give effect to federal

statutory objectives. GTE does not challenge state rights pursuant to state statutes to regulate rates for intrastate services. It asserts that no preclusion of state ratemaking jurisdiction would result from FCC preemption under Section 220(b), although failure to preempt will endanger important national policies.

19. GTE submits that Section 220(b) charges the Commission with the responsibility of prescribing depreciation rates for carriers subject to the Act and recognizes only two exceptions. First, the Commission should act as soon as possible. Second, Section 220(h) recognizes that certain classes of carriers may be exempted. The Commission, according to GTE, has not exercised its authority pursuant to this provision in this proceeding. Finally, GTE argues that reliance on *NCUC I* and *NCUC II* as supporting a finding that the Commission cannot preempt state commission depreciation prescriptions for carriers subject to the Act is inconsistent with the holdings and analysis of those cases. AT&T and GTE submit that Section 221(b) is inapplicable because that provision was intended only to give states the jurisdiction to regulate local exchange service extending over a state boundary.

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In RE: Reconsideration of Docket No. CC 79-105.

Having dissented from the Commission's original decision declining to preempt State accounting and depreciation rules inconsistent with those prescribed by the FCC,[1] I am pleased that the Commission has reconsidered this issue and acted to preempt such inconsistent State regulation.

As this *Order* establishes in detail, a true reading of the statutory language and legislative history of Section 220(b) of the Communications Act clearly demonstrates that Congress intended FCC depreciation rules and policies to control the field.

Even if preemption were not explicitly mandated by Section 220(b), the effective implementation of our pro-competitive federal telecommunications policies dictates that inconsistent State depreciation regulation be preempted by this Commission. We cannot "defer to the States" on capital recovery issues. Telephone companies must be able to recover their cost of capital in a timely and effective manner if they are to price their services efficiently and to improve and expand their facilities to meet the challenges of competition and technologic innovation.

This preemption imperative is not merely theoretical. Too many States (e.g., Alabama, Louisiana, Nebraska, Ohio, New Jersey, Michigan, Arkansas) have already refused to recognize the critical necessity of the FCC's cost recovery principles. The resulting depreciation rate differentials are alarming: GTE of Ohio has indicated that it will be denied

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[1]Amendment of Part 31, Joint Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones, 89 FCC 2d 1109-1111 (1981).

$7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

The FCC cannot ignore the detrimental impacts of inconsistent State treatment of depreciation if our pro-competitive policies are to have any integrity and viability. This Commission now recognizes that preemption is both mandated as a matter of law and essential as a matter of policy, and our action today has my full endorsement and support.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Southwestern Bell Telephone Company Plaintiff

VS. No. LR C 84-247

Arkansas Public Service Commission, et al. Defendants

ORDER

The plaintiff sued for declaratory judgment and preliminary and permanent injunctive relief for the defendants' failure to comply with orders of the Federal Communications Commission (FCC) and with 47 C.F.R. §67.1 and the Separations Manual adopted by the FCC. The parties have submitted extensive briefs, stipulations and affidavits concerning all issues necessary for disposition of the case. Although no party has moved for summary judgment, the issues will be dispositive and judgment shall be entered in accordance with this order unless the parties raise new issues within ten days of this order.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and 47 U.S.C. § 401(b). Venue is proper in this district pursuant to 28 U.S.C. § 1391.

The ultimate issues of this case require initial resolution of the jurisdiction of the FCC. It must be noted that the FCC is not a party to this lawsuit, although joinder would have been proper since the plaintiff seeks to enforce orders and rules of the FCC. *See* 47 U.S.C. §§ 401, 402 and 411.

The defendants issued an order in a rate request by the plaintiff January 23, 1984, *In the Matter of Southwestern Bell Telephone Company for an Order Establishing and Implementing New Intrastate Rates, Tolls and Charges Applicable to Intrastate Telecommunications Services Furnished Within the State of Arkansas*, Arkansas Public Service Commission Doc. No. 83-045-U, Order No. 29. Although the plaintiff is scheduled for rehearing by the defendants and has not exhausted its state law appeals, it sued in federal court, alleging two counts: (1) that the defendants violated a valid preemption order of the FCC requiring them to determine intrastate telephone rates by using accelerated depreciation methods used by the FCC for interstate ratemaking purposes; and (2) that the defendants violated FCC-ordered allocation procedures for separating interstate and intrastate costs.

The defendants admit that the FCC has ordered them to use the accelerated depreciation methods, but insist that the FCC lacked jurisdiction to issue the order. They insist also that they are following the cost separations procedures of the FCC.

I. FCC Jurisdiction

Count I.—The Federal Communications Commission was established by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, to regulate interstate and foreign communication. Congress expressly limited its jurisdiction, excluding regulation of intrastate communication. 47 U.S.C. § 152(b)(1). The FCC is authorized to determine depreciation rates for interstate carriers under 47 U.S.C. § 220(b). The FCC is authorized to exempt carriers such as the plaintiff

from any of its accounting requirements where they are concurrently regulated by state regulatory commissions. 47 U.S.C. § 220(h). Within a nine month period, the FCC interpreted § 220(b) to deny its jurisdiction over establishing depreciation rates for intrastate ratemaking, and then to grant such jurisdiction. *Compare Amendment of Part 31*, 89 F.C.C.2d 1094 (1982) *with Amendment of Part 31*, 92 F.C.C.2d 864 (1983) ("Preemption Order").

The Court has reviewed the FCC's analysis of the legislative history and is unpersuaded that the FCC has jurisdiction to determine intrastate depreciation methods. Although §220(b) is not *expressly* limited to interstate depreciation methods, this must be implied. The 1934 act left the door open for the FCC to ask Congress for additional authority under 47 U.S.C. § 220(j). In light of the express FCC jurisdictional *limitations* imposed by Congress, the FCC's interpretation of expanding jurisdiction is a non sequitur. The logic of expanding into intrastate jurisdictional matters in the name of "rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges" could, theoretically, allow the FCC to bootstrap itself into preempting *all intrastate* ratemaking determinations. 92 F.C.C.2d at 876 (citing 47 U.S.C. § 151). If the FCC wishes to have this authority, it should seek express congressional approval. The Court finds the FCC preemption of intrastate depreciation methods to be ultra vires and will not enforce it for the plaintiff.

Some mention has been made that only a court of appeals may invalidate an FCC order pursuant to 28 U.S.C. § 2342. However, 28 U.S.C. § 2342 is inapposite since this proceeding is not "any proceeding to enjoin, set aside, annul or suspend any order" of the FCC, making 47 U.S.C. § 402(a) applicable. Since the FCC is not a party, it will have no affect upon it. Further, determination of the issue is merely incidental to this lawsuit over which this Court has ample jurisdictional basis. If the FCC wishes to enforce its order, then it should take the appropriate steps.

Count II. —Unlike the depreciation issue of Count I, the FCC has full statutory authority, through the use of joint boards, for allocation of costs between interstate and intrastate jurisdictions where facilities are used for both purposes. 47 U.S.C. § 410.

II. Substantive Issues

Count I. —Since this Court finds that the FCC Preemption Order, 92 F.C.C.2d 864 (1983), is unenforceable, Count I must be dismissed and judgment entered for the defendants.

Count II. —There is no dispute between the parties that the defendants must follow the separations procedures established by the FCC. There are three primary issues over compliance with those procedures: (1) whether the defendants improperly reallocated open end traffic sensitive costs and closed end non-traffic sensitive costs associated with foreign exchange/common control switching arrangement (FX/CCSA) services, and from intrastate to interstate jurisdiction; (2) whether the defendants improperly reallocated open end non-traffic sensitive costs of FX/CCSA services from intrastate to interstate jurisdiction; and (3) whether the defendants properly refused to use updated operator work time studies in computing intrastate rates.

Issue (1): The defendants' January 23, 1984, order resulted in a shift of cost allocation from intrastate to interstate jurisdiction. The defendants admit that their order was in technical violation of an FCC "Freeze Order", *Amendment of Part 67*, 89 F.C.C.2d 1 (1982), which froze the **subscriber plant factor (SPF), a multiplication factor used** for determining the proper allocation of costs from facilities used for both intrastate and interstate traffic. Since the defendants' order was issued, however, the FCC amended the factor to include these two modifications made by the defendants. The amendment to the Separations Manual

shall become effective April 3, 1984. *In the Matter of Amendment of Part 67*, Order FCC 83-564 (adopted December 1, 1983, and released February 14, 1984). The issue remaining is whether a violation for ten weeks results in injury to the plaintiff. If so, then an appropriate remedy must be fashioned.

Issue (2): The determination of whether the defendants improperly reallocated open end non-traffic sensitive costs of FX/CCSA services to interstate costs depends upon whether the allocation was proper prior to the FCC Freeze Order, *Amendment of Part 67*, 89 F.C.C.2d 1 (1982). The defendants insist that the adjustments were in effect prior to the order. The parties stipulated that the adjustment to reallocate the costs to the interstate jurisdiction was made by the defendants in Order No. 12, APSC Doc. No. U-3117 (August 6, 1981). The same allocation was made in Order No. 11, APSC Doc. No. 82-037-U (November 29, 1982), and in the Januuary 23, 1984, order. The 1981 allocation under APSC Doc. No. U-3117 is pending decision on appeal to state court. Even if this allocation was originally proper, the issue remains whether it is valid after the freeze order.

Issue (3): The plaintiff maintains that the updated operator work time figures (OWT) should have been accepted by the defendants. The plaintiff frames the issue in terms of whether the defendants must accept updated figures or whether the OWT figures were frozen at the time in 1970 when the last Separations Manual was published. The defendants concede that they must accept updated OWT figures, and admit that they *have* accepted such updated figures in the past. The defendants frame the issue in terms of whether the plaintiff laid the proper evidentiary foundation for them to accept the numbers proposed by the plaintiff.

III. Exhaustion of Administrative Remedies and Absentention Doctrines

All of the issues raised by Count II raise broader issues of exhaustion of administrative remedies and abstention. Both doctrines have forceful support in this case. A collateral attack in federal court should not be used to unnecessarily subvert established state and federal administrative procedures. Primary jurisdiction for interstate/intrastate cost allocation or "separations" issues lies with the FCC and joint boards appointed by the FCC.

Exhaustion of administrative remedies is normally required before judicial relief is available. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980); *Darr v. Carter*, 640 F.2d 163 (8th Cir. 1981). The balancing test for an exception to this requirement is discussed in *West v. Bergland*, 611 F.2d 710 (8th Cir. 1979). If the "litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further," then no exhaustion of administrative remedies is required. *Id.* at 715 (citing *United States v. Newmann*, 478 F.2d 829, 831 (9th Cir. 1973)). The governmental interests include (1) allowing the agency to "perform functions within its special competence", including "specialized fact-finding", "interpretation of disputed technical subject matter," and "resolving disputes concerning the meaning of the agency's regulations; (2) "discouraging 'frequent and deliberate flouting of the administrative process' "; (3) "allowing the agency to have the first opportunity to develop the facts and apply the law it was designed to administer"; and (4) "allowing agencies to correct their own errors, and in so doing moot controversies and obviate judicial review." *Id.* at 715, 716. This case presents compelling circumstances for requiring exhaustion of administrative remedies with the FCC and upon rehearing by the defendants. The factual complexities of interstate and intrastate ratemaking are best resolved by those with that area of expertise.

The individual's interest in the balancing test requires "exceptional circumstances", generally by establishing "irreparable injury" or "inadequate remedy". *Id.* at 718. Unreasonable delay by the administrative agency may establish irreparable injury, but there is no showing that such a delay is expected to occur he *See Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587 (1926). In short, the plaintiff has not established that there are any exeeptional circumstances why issues of *compliance* with the FCC ordered separations should not be first addressed to the FCC. The statutory scheme states that "*any*" proceeding regarding the jurisdictional cost separations may be referred to a joint board by the FCC. 47 U.S.C. § 410(c). This would appear to include compliance issues. Thus, when the government's interest is weighed with the plaintiff's interest, the scales tip dramatically in favor of the government and require exhaustion of administrative remedies. The plaintiff has cited and supplied copies of cases decided by the FCC which resolve such issues. Where the FCC has clear jurisdiction, as it does over Count II issues, it should be consulted before going to federal court.

Further, a persuasive argument for abstention on the Count II issues can be made. Evidentiary questions and policy issues, such as the amount and method of recovery of inadequately set rates, should not be resolved in a collateral attack in federal court, but rather through normal state appeal. The Arkansas legislature has specifically addressed the policy issue of how utilities should recover when the rates set by the defendants are determined inadequate on appeal or rehearing. Ark. Stat. Ann. § 73-217 (Supp. 1983). Abstention on these issues is justified as a matter of federal discretion and comity in state regulatory matters. *Alabama Comm'n. v. Southern R. Co.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

IV. Preliminary Injunction Relief

The requirements for a preliminary injunction in this case will be addressed briefly, although the discussion is un-

necessary since Count I is dismissed for lack of FFC jurisdiction, and Count II is dismissed under the doctrines of exhaustion of administrative remedies and abstention. The parties have addressed two tests for injunctive relief: (1) statutory test under 47 U.S.C. § 401(b); and (2) common law test under *Dataphase Systems, Inc. v. C L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981).

(1) 47 U.S.C. § 401(b) provides injunctive relief if an "injured" party applies to district court and shows that an FCC order was "regularly made", "duly served" and disobeyed. Since there was no jurisdiction for the FCC to require accelerated depreciation rates for intrastate purposes, the order could not have been "regularly made" as a matter of law for Count I. The parties stipulated that the preemption order was "regularly made", but the Court interprets this stipulation to mean the order was "regularly made" only in a procedural sense, since the defendants clearly have objected to the FCC's jurisdiction. The plaintiff would have to establish "disobedience" for preliminary injunctive relief under Count II. This is unnecessary in light of the judicial doctrines discussed.

The parties have discussed the injury requirement extensively. The plaintiff maintains that it has incurred real financial and competitive losses due to the defendants' action which cannot be recovered under the Arkansas statutory provision, Ark. Stat. Ann. § 73-217 (Supp. 1983). The defendants insist that this statute allows full recovery and attack the claimed losses. These factual issues need not be resolved at this time, but it appears that the plaintiff is "injured" within the meaning of the statute.

(2) *Dataphase* Test. The traditional test for a preliminary injunction in this circuit requires evaluation of (a) the threat of irreparable harm to the plaintiff; (b) the balance of the plaintiff's harm with the injury to the other parties from the injunction; (c) the plaintiff's probabiliity of success on the merits; and (d) the public interest.

Dataphase, supra, 640 F.2d at 114. There is a *threat* of irreparable harm to the plaintiff, although disputed. No real injury to the defendants would occur. The plaintiff has no probability of success on Count I, and only limited probability of success on Count II. The public interest would weigh heavily on the side of the defendants, and not on the side of the plaintiff. The plaintiff would fail the *Dataphase* test.

V. Conclusion

The Court concludes that Count I should be dismissed for lack of FCC jurisdiction in issuing the Preemption Order of January 6, 1983, 92 FCC 2d 864, which required state regulatory commissions to use FCC ordered accelerated depreciation methods for intrastate ratemaking purposes. Count II shall be dismissed under the judicial doctrines of exhaustion of administrative remedies and abstention.

Either party may raise additional issues or make submissions necessary to complete the record for appeal within ten days. If no additional pleadings are submitted within that period, summary judgment shall be entered for the defendants and the case dismissed.

Ordered this March 30, 1984.

/s/ William R. Overton

United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 84-1488

Southwestern Bell Company,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Arkansas.
Arkansas Public Service Commission; Robert E. Johnston, Commissioner; Patricia S. Qualls, Commissioner; and James W. Daniel, Commissioner.	*	
Appellees.	*	

Submitted: May 17, 1984
Filed: June 7, 1984

Before HEANEY, BRIGHT and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Arkansas Public Service Commission denied a rate application filed by Southwestern Bell Telephone Company and, in doing so, refused to follow an order of the Federal Communications Commission mandating specific accelerated depreciation methods for intrastate ratemaking. Southwestern Bell then sought to enjoin the Arkansas

Commission's disobedience of the FCC order under 47 U.S.C. § 401(b) (1976). The district court denied Southwestern Bell's petition on the grounds that the order was ultra vires because the FCC lacked authority to prescribe depreciation methods for the intrastate portion of property used in providing telephone service. On appeal, Southwestern Bell argues that the district court was without jurisdiction to determine the validity of the FCC order and that it erred in denying injunctive relief. We reverse and remand with directions that the district court enjoin the Arkansas Commission from continued disobedience of the FCC order.

A 1980 order of the FCC established certain depreciation rates and methods for the interstate operations of tel phone companies. *Report and Order*, 83 F.C.C.2d 267 (1980). *reconsidered*, 87 F.C.C.2d 916 (1981). The FCC subsequently clarified its order by announcing that state regulatory commissions were not preempted from adopting inconsistent depreciation methods for purposes of intrastate ratemaking. *Memorandum Opinion and Order*, 89 F.C.C. 2d 1094 (1982). Within nine months, however, the FCC reversed its position and announced that state commissions were preempted from utilizing depreciation methods different from those mandated by the FCC. *Memorandum Opinion and Order*, 92 F.C.C. 2d 864 (1983) (Preemption Order). In reversing its position, the FCC concluded that the language and legislative history of 47 U.S.C.

§ 220(b) (1976),[1] along with its authority to preempt state actions that interfere with federal policies and objectives,[2] empowered it to "preempt inconsistent state depreciation policies and rates." *Preemption Order* at 880. A later FCC order prescribed Equal Life Group and Remaining Life depreciation methods, and attached a schedule based on these methods to be used by Southwestern Bell in Arkansas. *Order*, No. 83-587 (Dec. 20, 1983).

The Arkansas Commission was one of several interested parties which filed comments that were considered by the FCC before it issued the Preemption Order. The validity of the Preemption Order is on appeal to the United States Court of Appeals for the Fourth Circuit. *Virginia Corp. Comm. v. FCC*, No. 83-1136 (4th Cir. filed Feb. 18, 1983).[3] The parties have stipulated that the

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[1]47 U.S.C. § 220(b) provides as follows:

> (b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the clasess [sic] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

[2]47 U.S.C. § 151 (1976) provides in part that the FCC was created to "make available, so far as possible , to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, ..."

[3]Oral argument was heard on October 7, 1983.

Arkansas Commission is a party to the Fourth Circuit appeal and has taken no steps to stay the Preemption Order while the appeal is pending.[4]

On March 23, 1983, Southwestern Bell filed with the Arkansas Commission an application for a rate increase for its intrastate services. Part of its request was based on the increased depreciation expenses resulting from the FCC's Preemption Order. The Arkansas Commission rejected Bell's application, stating that

> [u]ntil such time as this matter is finally resolved in the Federal Courts or by the United States Congress we stand firm in our conviction and belief that the FCC does not have the lawful right to exercise preemption over intrastate depreciation rates.
>
> ....
>
> We believe that we have not lawfully been preempted by the FCC, therefore, we are not bound to adopt the depreciation methods prescribed by the FCC, but rather are free to adopt whatever depreciation methods we feel reasonable and justified.

In Re Application of Southwestern Bell Telephone Co., No. 83-045-U at 15-16, 18 (Jan. 23, 1984).

On March 9, 1984, Southwestern Bell filed a complaint in district court. It sought a declaratory judgment that the Arkansas Commission's refusal to abide by the Preemption Order was unlawful and to enjoin it from using any depreciation methods other than those prescribed by the FCC.[5] The district court denied the relief sought by

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[4]The reviewing court has authority to stay an FCC order pending judicial review. 28 U.S.C. § 2349(b) (1982).

[5]Southwestern Bell's complaint also contained a second count seeking the same relief from the Arkansas Commission's transfer of certain revenue requirements to interstate jurisdiction. This issue is not before us on this appeal.

Southwestern Bell. It held that the Preemption Order was ultra vires because the FCC lacked jurisdiction to preempt inconsistent depreciation rates for intrastate ratemaking. It denied injunctive relief under 47 U.S.C. § 401(b)[6] on the grounds that an ultra vires order cannot be "regularly made" within the meaning of that statute. The district court also examined Southwestern Bell's request for injunctive relief under the traditional equitable analysis. *See Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). It held that Bell failed this standard for two reasons: (1) it had no probability of success on the merits because the FCC order was ultra vires and (2) the public interest factor weighed heavily on the side of the Arkansas Commission. This appeal followed. We set an expedited briefing schedule and heard oral argument on May 17, 1984.

I.

Under 28 U.S.C. § 2342(1) (1982), the courts of appeals are given exclusive jurisdiction to "enjoin, set aside, suspend . . . , or to determine the validity of all final orders of the Federal Commission . . . ." *City of Peoria v. General Elec. Cablevision Corp.*,690 F.2d 116, 119 (7th Cir. 1982); *City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979). The Supreme Court recently confirmed the primacy of appellate court jurisdiction under section 2342(1). *FCC v.*

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[6]47 U.S.C. § 401(b) provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

ITT World Communications, Inc., 52 U.S.L.W. 4507 (Apr. 30,, 1984). This decision makes clear that litigants may not evade the requirements of section 2342(1) and 47 U.S.C. § 402(a) (1976)[7] by requesting the district court "to enjoin action that is the outcome of the agency's order." *ITT World Communications*, 52 U.S.L.W. at 4509.

While *ITT World Communications, supra*, was decided after the district court decision, the Arkansas Commission nevertheless argues that the district court had jurisdiction to declare the Preemption Order ultra vires.[8] It contends that section 2342 and *ITT World Communications* are inapplicable because the present case does not involve an action to enjoin or set aside an agency action. The Arkansas Commission points out that in *ITT World Communications*, the action was not brought under statutes specifically granting the district court subject matter jurisdiction. This case, however, was brought under section 401(b) which specifically grants the district court jurisdiction to enforce FCC orders. The Arkansas Commission further argues that the specific grant of jurisdiction provided under section 401(b)[9] permits the district court to consider the validity

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[7]47 U.S.C. § 402(a) provides as follows: "Any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."

[8]The district couurt acknowledged section 2342 in its order, but held it inapposite since the proceeding was not one to enjoin, set aside, annul, or suspend an order of the FCC.

[9]In addition to section 401(b), Southwestern Bell brought its action under 28 U.S.C. §§ 1331, 1337, 2201 and 2202 (1983). The Arkansas Commission asserts that the district court possessed ancillary jurisdiction incident to each of these statutes. Our disposition of its argument under section 401(b) applies with equal force to each of the remaining statutes.

of the Preemption Order under the doctrine of ancillary jurisdiction.[10]

We reject the argument that the district court possessed ancillary jurisdiction incident to section 401(b). It is well established that where a statute specifically provides for exclusive jurisdiction in one court, as 28 U.S.C. § 2342 does, the specific grant of jurisdiction takes precedence over a general grant of jurisdiction. *See, e.g., Assure Comp. Transp., Inc. v. United States*, 629 F.2d 467, 471 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); *City of Rochester v. Bond*, 603 F.2d at 935; *Inv. Co. Inst. v. Fed. Reserve Sys.*, 551 F.2d 1270, 1279 (D.C. Cir. 1977); *United States v. Southern Ry. Co.*, 364 F.2d 86, 91-92 (5th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967). The specific grant of exclusive jurisdiction in the courts of appeals for review of FCC orders precludes the district court from exercising ancillary jurisdiction to determine the validity of the Preemption Order.

The argument that section 2342 and *ITT World Communications* are inapplicable to the present case is also without merit. Although Southwestern Bell did not bring this action as one to enjoin or set aside an agency order, the Arkansas Commission's defense was the invalidity of the Preemption Order. Where the practical effect of a successful attack on the enforcement of an order involves a determination of its validity, the statutory procedure for

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[10]The Arkansas Commission also contends that district courts possess jurisdiction to attack the validity of administrative rulings that are ultra vires of the agency's authority under the patent violation doctrine established in *Leedom v. Kyne*, 358 U.S. 184 (1958). In *Leedom*, the district court was found to have jurisdiction on the ground that the National Labor Relations Board's action was in violation of an explicit statutory requirement. *See Indep. Cosmetic Mfgrs. v. Dep't of Health, Education & Welfare*, 574 F.2d 553 (D.C. Cir. 1976), *cert. denied*, 439 U.S. 893 (1978). We cannot conclude that the Preemption Order constitutes a patent violation of the FCC's authority.

review provided by Congress remains applicable.[11] *Cf. B.F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1353-54 (3rd Cir. 1970), *cert. denied*, 400 U.S. 822 (1970) (statutory procedure for review of ICC orders is applicable so long as the practical effect of a successful suit "would contradict or countermand a Commission order."); *Simpson v. Southwestern R.R. Co.*, 231 F.2d 59 (5th Cir.); *cert. denied*, 352 U.S. 828 (1956) (statutory procedure for review of ICC orders is applicable even where suit is one to enjoin action *authorized* by the Commission rather than one to enjoin an order of the Commission) (emphasis in original).

Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action. The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review. *Cf. Minnesota v. O'Neil*, 472 F. Supp. 905, 908 (D. Minn. 1979) (where exclusive jurisdiction is provided by statute, plaintiff cannot bypass the procedure "by labeling its requested relief 'mandamas.' "). In determining that the Preemption Order was ultra vires, the district court countenanced just such an evasion.

The exclusive review procedure provided for by Congress in section 2342 serves important policy considerations. It insures that review will be vested in an appellate panel and not in a single district judge. It guarantees that

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[11]Six district courts have enjoined state regulatory commissions from disobeying the Preemption Order under section 401(b), and have properly declined to review the Orders validity. *Mountain States Tel. & Tel. Co. v. Dep't of Public Serv. Regulation*, No. CV-83-177-H (D. Mont. Aug. 22, 1983); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983); *South Central Bell Tel. Co. v. Louisianna Public Service Comm'n.*, 570 F. Supp. 227, 233 (M.D. La. 1983); *New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine*, 570 F. Supp. 1558, 1577, 1581 (D. Me. 1983); *Chesapeake & Potomac Tel. Co. v. Public Service Comm'n.*, 560 F. Supp. 844, 848-49 (D. Md. 1983); *Pacific N.W. Bell Tel. Co. v. Washington Utility and Transp. Comm'n.*, 565 F. Supp. 17, 21 (W.D. Wash. 1983).

agency action will be reviewed on the basis of the administrative record rather than a district judge's de novo fact-finding. It also avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues.[12] The legislative history of section 2342 also demonstrates that one of its purposes was to eliminate the duplication of effort that resulted under prior law when appeals from agency orders were tried de novo in the district courts. H. Rep. No. 2122, 81st Cong., 2d. Sess. 3-4 (1950). Allowing the Arkansas Commission to interpose its defense of invalidity in this section 401(b) enforcement action would compromise all of these policy concerns. *Cf. Tampa Phosphate R.R. Co. v. Seaboard Coast Line R.R. Co.*, 418 F.2d 387, 399 (5th Cir. 1969) *cert. denied*, 397 U.S. 910 (1970) (the invalidity of an ICC order was not reviewable by a single-judge trial court when statutory provisions governing review confined such challenges to a three-judge court.) This is especially true in the present case. The Arkansas Commission intervened in the Fourth Circuit appeal,[13] but did not request a stay of the Preemption Order. Instead, in response to Southwestern Bell's rate application, it expressly defied the Order, and later raised its invalidity as a defense to Southwestern Bell's enforcement action. If the district court could exercise jurisdiction in these circumstances, then the application of section 2342 could be consistently avoided simply by waiting until an en-

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[12]*See generally Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 983-85 (1975).

[13]The Arkansas Commission argues that it was not a party to the FCC proceeding nor to the appeal to the Fourth Circuit. The record reveals otherwise. The Arkansas Commission filed comments in the FCC proceeding which resulted in the Preemption Order and stipulated that it intervened and is a party to the Fourth Circuit appeal. It participated in arguments made by twenty other state regulatory commissions in that appeal. We think it clear, therefore, that the Arkansas Commission was a party to the FCC proceeding and is a party to the appeal. *See Port of Boston Marine Terminal Assn. v. Rederi. Transatlantic*, 400 US.. 62, 71-72 (1970).

forcement action is brought in the district court and then interjecting what amounts to an action for review as a defense. This would undermine the judicial structure Congress created when it enacted section 2342.

The Arkansas Commission also contends that the district court may determine the validity of the FCC order in an enforcement proceeding because 47 U.S.C. § 401(b) requires the district court issuing an injunction to determine whether the FCC order was "regularly made." The Arkansas Commission argues that "regularly made" requires both procedural and substantive regularity. We believe that the term "regularly made" as used in section 401(b) refers only to procedural regularity; otherwise, the exclusive provision of the statutory review procedure set forth in 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) would be superfluous. *See South Central Bell Tel. Co.*, 570 F. Supp. at 233-34; *New England Tel. & Tel. Co.*, 570 F. Supp. at 1574; *Chesapeake & Potomac Tel. Co.*, 560 F. Supp. at 848.

FCC orders become effective upon issuance unless stayed by the FCC or a reviewing court. 47 U.S.C. § 408 (1976). The FCC is not required to seek enforcement of its orders before they become effective. Therefore, the Preemption Order was binding on the Arkansas Commission and was to be accorded the same preemptive effect as federal statutes. *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982). The district court had no jurisdiction to deny enforcement of the FCC order on the basis that it was ultra vires.

II.

47 U.S.C. § 401(b) provides that any party injured by a person's failure to obey an FCC order may apply to a district court for enforcement of that order. Such enforcement may be by "writ of injunction or other proper process" upon a finding that the order was (1) regularly made; (2) duly served; (3) disobeyed; and that (4) a party was

thereby injured. The district court examined Southwestern Bell's petition for injunctive relief under both section 401(b) and the traditional equitable analysis enumerated in *Datanhase Systems*, 640 F.2d at 113. It concluded that Southwestern Bell's petition failed under both standards. We believe that only the statutory criteria need be satisfied and that the traditional equitable standard is not applicable where, as in this case, we have a clear violation of a self-executing order of an administrative agency. *see* 47 U.S.C. § 408, which is accorded the same preemptive effect as a federal statute, *Fidelity Federal Savings & Loan Assn., supra* and where substantive review of that order is vested in another court, *see* 28 U.S.C. § 2342(1), 47 U.S.C. § 402(a). *Cf. United States v. City and County of San Francisco*, 310 U.S. 16, 30 (1940) (city's violation of restriction attached to land grant may be enjoined under enforcement provision without "a balancing of equities or . . . the invocation of the generalities of judicial maxims . . . ."). Congress has specifically created in section 401(b) an exclusive mechanism for enforcing FCC orders, and, under these circumstances, it must be used.

The parties stipulated that the FCC order was "regularly made and duly served." The district court concluded that "regularly made" includes the substantive requirement that the FCC have jurisdiction to issue the order. As we have demonstrated, the district court erred in reaching this conclusion, and therefore the stipulation between the parties satisfies the first and second criteria of section 401(b). The Arkansas Commission unilaterally concluded that the FCC lacked jurisdiction and deliberately disobeyed the Preemption Order.[14] Finally, the district

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[14]*See* page 4, *supra*.

court concluded, and we agree, that Southwestern Bell is both a party and is suffering injury[15] within the meaning of Section 401(b).

Once the four elements of section 401(b) are satisfied, the statute directs that "the court *shall* enforce obedience to such order by a writ of injunction or other proper process . . . ." (emphasis suppliied). We do not read "shall" as withholding all discretion from the district court with respect to issuance of the injunction. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). Under the circumstances of this case, however, we conclude that denial of injunctive relief would be an abuse of discretion.

As indicated previously, the Arkansas Commission filed comments with the FCC. It stipulated that it is a party to the Fourth Circuit appeal and did not request a stay of the Order.[16] The Arkansas Commission then adopted depreciation methods inconsistent with those required by the Order. The Arkansas Commission's order responding to Southwestern Bell's application for a rate increase demonstrates studied consideration of its defiance of the Preemption Order. This is disobedience that section 401(b)

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[15]Section 401(b) requires only that a party be injured by disobedience to an FCC order. The traditional equitable criterion of irreparable injury is thus inapplicable. *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981). The record reveals that if Southwestern Bell is permitted to adopt FCC-mandated depreciation methods, its yearly intrastate revenue requirement would increase by approximately $11,256,223. We further note that the current loss of funds is especially critical because of competitive pressures resulting from the restructuring of the telephone industry. It is also clear that Southwestern Bell suffers injury by being forced to observe two contradictory sets of regulations, thus exposing it to potential penalties for noncompliance. *See Public Utilities Comm's of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943). Under these circumstances, Arkansas' retroactive recovery statute, which entitles a public utility to collect with interest revenues that were unlawfully withheld, does not insulate Southwestern Bell from injury in the present case. *See* Ark. Stat. Ann. §73-217(c)(ii) (Supp. 1983).

[16]J.A. at 253 (Stipulation No. 11).

was clearly designed to remedy. In view of this conduct, and as the elements of section 401(b) have been satisfied, we believe that it would be an abuse of discretion to deny equitable relief to Southwestern Bell. We conclude that the proper procedure is to remand to the district court with instructions to enter the injunction. *See Thornton v. Carter*, 109 F.2d 316, 319 (8th Cir. 1940).

The validity of the FCC's order is currently before the Fourth Circuit. We express no opinion on the issues that will be properly determined by that court. Accordingly, we direct that the district court enter its order enjoining the Arkansas Commission from refusing to follow the FCC order until such time as the Fourth Circuit has issued its decision. At that time, the district court should consider further relief consistent with the Fourth Circuit's decision. If the FCC's order is found to be valid, a permanent injunction may be required. If found to be invalid, and Southwestern Bell has collected increased revenues on the basis of the order, it may be required to refund such overpayments.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
For the First Circuit

No. 83-1779

New England Telephone and Telegraph Company, etc.,
Plaintiff, Appellee,

v.

Public Utilities Commission of Maine, et al.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MAINE
(Hon. Gene Carter, *U.S. District Judge*)

Before
Campbell, *Chief Judge*,
Breyer, *Circuit Judge*,
and Gierbolini,* *District Judge*

William E. Furber, with whom *Charles F. Dingman*, *Cushing P. Samp*, *Joseph G. Donahue*, *Peter L. Murray*, and *Murray, Plumb & Murray* were on brief, for appellants.

Francis X. Bellotti, Attorney General, and *Charles R. Peck*, Assistant Attorney General, Commonwealth of Massachusetts, Utilities Division, Public Protection Bureau, on brief for the Attorney General for the Commonwealth of Massachusetts, amicus curiae.

Robert A. Lewis, with whom *Ralph I. Lancaster, Jr.*, *Everett P. Ingalls*, and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief, for New England Telephone and Telegraph Company.

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*Of the District of Pureto Rico, sitting by designation.

June 29, 1984

BRYER, *Circuit Judge.* In this case a private party seeks to enforce a decision of the Federal Communications Commission against a recalcitrant state utilities commission. The FCC promulgated a rule that required state public utility commissions to follow a certain method for calculating depreciation of telephone company equipment. The Public Utilities Commission of Maine ("the P.U.C.") evidently ignored the FCC rule. The private party, namely the New England Telephone Company, invoking the authority of section 401(b) of the Federal Communications Act, 47 U.S.C. § 401(b), obtained a federal district court injunction requiring the Maine commission to comply with the FCC rule. 570 F. Supp. 1558 (D. Me. 1983). Section 401(b) of the Act states that if anyone

> fails or neglects to obey any order of the [Federal Communications] Commission . . . , any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.

We find that the word "order" in this statute does not include an FCC rulemaking decision of the sort here at issue. Thus, the district court lacked authority to issue the injunction.

I

We start by examiniing the FCC decision at issue. The decision focused upon the question of how to recapture through depreciation charges the cost of a telephone company asset that has unexpectedly lost some of its anticipated economic value. (For a general description of cost recovery through regulated rate-setting, see *Distrigas of Massachusetts Corp. v. FERC*, No. 83-1633 (1st Cir. June 14, 1984.) To take an oversimplified, imaginary example to illustrate the problem, suppose that the telephone company

originally thought that some connecting equipment (say, a $50 fuse) installed in 1960 on the line between a house and a street pole would last fifty years. The company might initially depreciate the equipment at the rate of $1 per year. Suppose further that in 1980, after the company has recaptured $20 through depreciation charges, a new, dirt cheap, technological development makes it sensible to replace the fuse in 1985, instead of in the year 2010. How should the company recapture the remaining $30 of its original equipment cost? One depreciation method, called the "whole life" method, would have the company recalculate the annual depreciation charge for future years by dividing the original $50 cost by the newly estimated whole life of the asset (25 years). Thus, for the next five years, the company would charge $2 per year. By 1985, the company, then, would have recovered $30 of its $50 investment; the remainder would be recovered after the fuse was taken out of service. Another method, called the "remaining life" method, would have the company recalculate the annual depreciation allowance by dividing the remaining undepreciated cost of the fuse ($30) by its remaining useful life. So, the company would charge $6 per year for the years 1981 to 1985, reccovering the total cost by the time the fuse was retired from service.

The economic implications of the choice between these methods are likely to be complex and may be of great importance. *See generally* Cornell, Pelcovits, & Brenner, *A Legacy of Regulatory Failure*, Regulation, July/Aug. 1983, at 37; Fogarty, *Capital Recovery: A Crisis for Telephone Companies, A Dilemma for Regulators*, Pub. Util. Fort., Dec. 8, 1983, at 13. The "remaining life" method, for example, apparently means that consumers will have to pay more in the near future, but less in the more distant future. Moreover, there are those who argue that in the newly deregulated telephone world, the foreseeably longterm higher "phantom" depreciation charge resulting from the whole life approach (say, $2 extra per year from 1985 to 1995 to recover for the replaced fuse) could lead important

customers to switch from the regular telephone system to other lower priced (but economically more costly) systems. If so, customer desertion could deprive the regular system of important sources of revenue and burden remaining customers with still higher charges.

Whether or not these concerns are accurate, the fact is that in 1980 the FCC announced that it would switch from "whole life" to "remaining life" depreciation methods. *In re Amendment of Part 31, etc.*, 83 FCC 2d 267 (1980), *reconsidered*, 87 FCC 2d 916 (1981). And in December 1982 it ruled that New England Telephone and certain other phone companies must use "remaining life" systems in setting their *inter*state rates. *In re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC 2d 920 (1982). It expressly said, however, that it would determine the applicability of its choice of methodologies to *intra*-state rates (the subject now before us) in a "separate proceeding." *Id.*, at 928-29.

The "separate proceeding" was a rule-making proceeding, which initially involved a different depreciation question, namely whether certain telephone assets should be depreciated or treated as current expenses. *In re Amendment of Part 31, Uniform System of Accounts, Etc.*, Docket No. CC 79-105. The FCC concluded that some of the assets should be charged as current expenses, at least insofar as *inter*state rates were concerned. 85 FCC 2d 818 (1981), *clarified as only affecting interstate rates*, 89 FCC 2d 1094 (1982). Several phone companies then asked the FCC to reconsider whether it should not apply its rule to *intra*-state rates as well.

In the meantime, an Ohio telephone company asked the FCC for a "declaratory ruling" that the Commission's newly announced preference for a "remaining life" depreciation system applied to *intra*-state, as well as to *inter*state, rates and preempted contrary preferences of state regulatory commissions. The FCC evidently believed that the Ohio case and the *Part 31* case reconsideration both involved the

same general question, whether the FCC should require state commissions to apply FCC depreciation policies in intra-state ratemaking. Hence, it consolidated the two proceedings.

In January 1983 the FCC announced its decision in the (now consolidated) *Part 31* reconsiderations. 92 FCC 2d 864 (1983). It held that its methods for calculating depreciation were automatically binding upon the state commissions under the Communications Act, 47 U.S.C. § 220(b). It added that, in any event, even if the federal Act did not *automatically* preempt the right of state commissions to follow different depreciation methods for intra-state transactions, the Commission could (and did) forbid their doing so, for a nationally uniform depreciation policy was of great importance to a sound national communications policy. The Maine P.U.C. was not a party to the *Part 31* reconsideration proceeding, but some other state regulatory commisssions were, and several of these commissions have appealed the FCC's ruling to the Fourth Circuit, where the case awaits decision. *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir.).

In April 1983, three months after the FCC's consolidated *Part 31* reconsideration decision, the Maine P.U.C. denied New England Telephone a rate increase in part because the increase rested upon the use of "remaining life" depreciation. The Maine commission decided that the FCC decision was unlawfuul—that the FCC could not tell it what depreciation methods to use. New England Telephone appealed the P.U.C.'s decision to the Maine Supreme Judicial Court, but it did not raise the "remaining life" issue in its appeal. Instead, it went to federal court, under 47 U.S.C. § 401(b), arguing that the Maine commission's definance of the FCC was unlawful and should be enjoined. The federal district court agreed. The Maine P.U.C. now appeals its decision.

II

The FCC decision at issue is the product of a rulemaking proceeding, namely the *Part 31* reconsideration. *See* pages 19-20 *infra*. The decision also fits the Administrative Procedure Act's definition of a "rule:" It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . . " 5 U.S.C. § 551(4). Hence, we consider it to be a rule. And, we ask whether such a rule can also be considered an "order of the Commission" within the terms of section 401(b) of the Communications Act. We note that several other courts have been asked to enforce the preemptive effect of the FCC's *Part 31* reconsideration decision pursuant to section 401(b), and a number of them have granted the requested injunctions. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983); *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983). But none of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine P.U.C. has raised here: whether the FCC's decision constitutes an "order" in the contemplation of section 401(b). We conclude that it does not, for several reasons.

First, the Administrative Procedure Act defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking* . . . ." 5 U.S.C. § 551(6) (emphasis added). Although this definition applies to the APA, enacted in 1946, and not necessarily to the Communications Act, enacted in 1934, the APA was the product of extensive study of pre-existing procedure. Some of its provisions—

particularly those governing judicial review—were largely declaratory of existing law. Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1829 (1978). And, post-APA statutes and rules typically incorporate the APA's concepts and distinctions. Thus, even if pre-APA statutes used the term "order" inconsistently, procedural coherence warrants reference to the APA's definitions as a starting point and their use as a guide in determining the proper construction of pre-existing, related procedural statutes—at least where other non-APA considerations also point clearly in the same direction. *See Kroeger v. Stahl*, 148 F. Supp. 403, 406 (D.N.J.) (using APA definition of "order" in interpreting 47 U.S.C. § 401(b), *aff'd*, 248 F.2d 121 (3rd Cir. 1957).

Second, to interpret section 401(b) more broadly—to apply it beyond the context of the "adjudicatory order"—threatens to interfere seriously with the well established principle that the "enforcement" of the Communications Act is "entrusted primarily to an administrative agency." *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *see Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982) ("The focus of the Act is the general public, with the FCC, not the private litigant, as its champion.") Section 401, in relevant part, reads as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.
>
> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or

> any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The first part, subsection (a), allows the *Commission* to ask a federal court to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; the second part, subsection (b), allows a private person to require compliance with a Commission "order." Section 401(a) allows the Commission to decide precisely where and how to enforce the Act. Section 401(b) is consistent with the Commission's prerogatives under section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

Third, to interpret "order" in section 401(b) broadly enough to encompass rules threatens the sound development of a coherent nationwide communications policy—a central objective of the 1934 Act. *See* 47 U.S.C. § 151; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Benanti v. United States*,355 U.S. 96, 104 n.14 (1957). Rules are general in form and they can be highly general in content. *See, e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418 (1942) ("Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making

power is addressed to and sets a standard of conduct for all to whom its terms apply."); *Precious Metals Associates, Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 911 (1st Cir. 1980) ("Rulemaking proceedings are . . . designed to fill in the interstices of a statute.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) and *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973); *PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718, 732 (3rd Cir. 1973) ("Rulemaking . . . characteristically involves . . . declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it."), *cert. denied*, 416 U.S. 969 (1974).

To apply a rule to particular cases often (though not always) requires not only adjudicatory fact finding, but also interpretation of the rule's scope and meaning. *See, e.g., Gardner v. Toilet Goods Association*, 387 U.S. 167, 193-98 (Fortas, J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission*, 704 F.2d 929, 932-33 (7th Cir. 1983). To construe 401(b) to include a private right to enforce commission rules would place this interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (and inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy. And one need only look at the highly general language in which some Commission rules are stated to realize that this shift of power from Commission to courts is not merely a theoretical concern. *See, e.g.*, 47 C.F.R. § 21.3 (general principles of telecommunications licensing); 47 C.F.R. § 73.1920 (personal attack rule). There is no reason to believe that Congress intended an interpretation of 401(b) that could threaten such a shift or undermine the well established bar against private actions to enforce the Communications Act. *See, e.g., Lechtner v. Brownyard, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co., supra.*

Fourth, the Act's statutory review provisions can be read more fairly and coherently if 401(b) is construed narrowly. The normal way to obtain review of an FCC order is for a party to petition a circuit court of appeals. 47 U.S.C. § 402; *see, e.g., City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979) (§ 402 as exclusive route to judicial review). Section 401(b) seems to foresee such review, for it discourages the district courts from reexamining the validity of the FCC "order" in question. It states that if, "after hearing, th[e] court determines that the order was regularly made and duly served," the court shall enforce obedience; this language suggests that the substantive validity of the order is not to be considered. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *American Bond & Mortgage Co. v. United States*, 52 F.2d 318, 320 (7th Cir. 1931), *cert. denied*, 285 U.S. 538 (1932); *United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791, 793-94 (S.D.N.Y. 1954). This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding. *Compare Yakus v. United States*, 321 U.S. 414 (1944) (administrative regulation can be enforced in proceeding which precludes review of validity of the regulation) *with Adams Wrecking Co. v. United States*, 434 U.S. 275 (1978) (suggesting troubling nature of the *Yakus* holding and its limited reach) *and id.* at 289-90 (Powell, J., concurring) (same). The anomaly of such a restriction on proceedings to enforce rules would have been perceived still more forcefully in 1934, when 'pre-enforcement' review of rules was virtually non-existent—when the validity of a rule was typically first considered at the time of enforcement. *See, e.g., Federal Power Commission v. Metropolitan*

Edison Co., 304 U.S. 375, 383-85 (1938); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-97 & n.55, 202-03 (1974). *Cf. Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 & n. 20 (1970). And this fact makes it rather unlikely that Congress believed section 401(b) would apply to Commission rules.

Fifth, other sections of the Communications Act use the word "order" in a way that seems to envision Commission decisions requiring specific actions of specific carriers. *See, e.g.*, 47 U.S.C. §§ 201 (orders directing carriers to establish through services); 204 (orders concerning collection and refund of proposed increased rates); 205 (order directing carrier to cease and desist from charging unreasonable rates); 209 (order directing carrier to pay damages for violation of Act); 214(d) (order directing carrier to expand its facilities). With one exception, to which we shall turn shortly, we are unaware of any provision that uses the word "order" to refer to FCC interpretations of the Act or to FCC rules of general applicability. Indeed, section 416 of the Act, 47 U.S.C. §416(a), provides that "[e]very order of the Commisssion shall be forthwith served upon the designated agent of the carrier . . . ." This language suggests that Congress assumed that "orders" took the form of specific directives to specific parties.

Sixth, to allow communications common carriers to enforce generalized FCC policy against state commissions through 'enforcement' suits in federal district courts threatens issue splitting and procedural complexity. New England Telephone, for example, might readily have raised the 'depreciation' problem in the Maine Supreme Judicial Court, where it obtained review of the rest of the P.U.C.'s rate decision in which the depreciation issue was embedded. Instead, it expressly withheld the issue from that proceeding, bringinng it before the federal district court instead, thereby leaving the state court in the difficult position of trying to judge the reasonableness of certain of the

P.U.C.'s determinations—the selection of a rate of return fairly reflecting the risks to investors, for example—without considering the closely inter-related depreciation issue. The Maine courts were to review Hamlet without the Prince; the federal courts, the Prince without the rest of the play. Since the supremacy clause of the federal Constitution requires the Maine courts to apply federal commuunications law where appropriate, we see no reason to read the statute to encourage this form of fractionated review.

III

Before concluding, we consider three arguments in New England Telephone's favor:

First, in *Columbia Broadcasting System v. United States*, *supra*, the Supreme Court interpreted the word "order" in 401's neighboring section, section 402, to encompass agency rules promulgated after rule-making proceedings. Thus, our interpretation requires reading the same word differently in the two sections. While we recognize the force of the argument calling for a similar construction, *see, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Firestone v. Howerton*, 671 F.2d 317, 320 & n.6 (9th Cir. 1982), we find sufficient difference in the functions of the two sections to justify assigning a different scope to the same word in the two settings. *See, e.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 104 S.Ct. 575 (1984); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461 n. 230 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

Section 402(a), which the *CBS* Court considered, concerns judicial review of FCC decisions. It states

> Any proceeding to enjoin, set aside, annul, or suspend any *order* of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. § 402(a) (emphasis added); *see* 28 U.S.C. § 2342 ("The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final *orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . . .") (emphasis added). *CBS* concerned the FCC's Chain Broadcasting Regulations, which told broadcasting stations in part how they were to deal with the networks. CBS argued that the Court should review the regulations' lawfulness, despite the absence of any enforcement order based on the regulations. If it had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, CBS said, for the stations intended to obey the regulations, to CBS's detriment. Thus, to interpret "order" in section 402 to apply only to the outcome of an adjudicatory enforcement proceeding would deprive those who might be seriously injured by others' obedience to an FCC rule of any opportunity to challenge the rule's legal validity. The Court agreed. And it considered the regulations to have sufficiently serious and immediate impact to warrant pre-enforcement review of their lawfulness. Accordingly, rules were swept within the scope of section 402's reference to "any order."

As this statement of the issues in *CBS* reveals, the policy concerns relevant to a proper interpretation of the word "order" in section 402 involve fundamental principles of judicial review and fair treatment. These concerns point towards a broad interpretation of the word in section 402, but no such considerations are at issue in the case of section 401. To the contrary, private parties have no inherent right to enforce FCC rules, and, as we have remarked above, considerations of fairness favor, if anything, a narrow construction of section 401's reference to "any order." In the absence of some strong policy reason favoring a broad interpretation of "order" in section 401, the various considerations previously discussed seem sufficient to outweigh the importance of linguistic uniformity among *different sections* of the statute.

Second, New England Telephone denies that the FCC decision here at issue was embodied in a "rule;" rather, it contends we should consider it as an adjudicatory order. The decision was called a "Memorandum Opinion and *Order*" (emphasis added); and it was issued as a "declaratory order" pursuant to 47 C.F.R. § 1.2 (authorizing the Commission) to issue declaratory rulings, in accordance with section 5(e) of the APA, 5 U.S.C. § 554(e)). As the Supreme Court has said, however, "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. at 416. The FCC commonly adopts rules in opinions called "orders." *See, e.g.*, 47 C.F.R. § 1.429(i); *Columbia Broadcasting System, Inc. v. United States*,316 U.S. at 425. And, in this instance, the proceedings that led to the decision were "properly treated by the FCC as rule making proceedings under 47 C.F.R. §§ 1.399 - 1.429." 570 F. Supp. at 1571. The FCC has confirmed that the decision "was adopted as part of a rulemaking docket." Memorandum of Federal Communications Commission as Amicus Curiae at 16. There is no indication that anyone followed adjudicatory, rather than rulemaking, procedures.

The temptation to refer to the FCC's deliberations as an "adjudicatory proceeding" that led to a "declaratory order" arises from the FCC's consolidation of the pure *Part 31* rulemaking proceeding with GTE of Ohio's declaratory action against the Ohio Public Utilities Commission. The latter action—entitled "Petition for Declaratory Ruling"—might perhaps be regarded as adjudicatory, despite its consolidation into a rulemaking proceeding. But even if its culminating order was regarded as enforceable under 401(b), it would be enforceable against the Ohio P.U.C., not the Maine P.U.C., which was not a party to the declaratory action. (Nor for that matter was the Maine Commission a party to the Part 31 proceeding with which the Ohio proceeding was consolidated.)

Third, New England Telephone points to the importance of the policy that the FCC is trying to vindicate with its effort to enforce uniform national depreciation rules. The threat of uneconomic bypass of the existing telephone system is arguably serious and may well justify regulatory decision-making by a single national authority. Moreover, New England Telephone suggests that the FCC's authority to impose preemptive nationwide rules is obvious. *See, e.g., Computer & Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____ (1983); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). Thus, it believes the Maine commission is acting contrary to clear law. Assuming, for the sake of argument, that all this is true, however, why must section 401(b) offer the only remedy? The federal courts are currently considering the substantive arguments concerning the FCC'-s authority. *Virginia State Corporation Commission v. FCC, supra.* Is it not reasonable to assume that the Maine commission and the Maine courts will read the decision? And, in the meanwhile, does New England Telephone not have a remedy sufficient to ameliorate any serious threat to the national telephone network through section 401(a); can it not ask the Commission to bring an enforcement action if the threat is truly serious? Finally, why can it not obtain an adjudication from the FCC against the Maine commission, through the same declaratory ruling procedure employed by GTE of Ohio, and *then* enforce the resultant order under 401(b) if necessary? Of course, in the process, the FCC likely will have to decide how important it is to vindicate New England Telephone's position. But this agency check permits assurance that New England Telephone's claim of public importance is correct, a determination that is properly left in the first instance to the FCC.

In sum, we conclude that New England Telephone cannot bring this case in federal court under the authority of section 401(b).

The injunction is vacated and the case is remanded to the district court with instructions to dismiss the action.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1331 Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

United States Code, Title 28:

§1337(a) Commerce and antitrust regulations; amount in controversy, costs

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

United States Code, Title 28:

§2342(1) Jurisdiction of court of appeals

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

United States Code, Title 47:

§152(b)

Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign **communication solely through physical connection** with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or (3) of this subsection would be applicable except for furnrishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

United States Code, Title 47:

§220(b) Accounts, records, and memoranda; depreciation charges; forfeitures and penalties

The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not,

after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under it operating or other expenses.

United States Code, Title 47:

§220(h)

The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carrieres are subject to State commission regulation with respect to matters to which this section relates.

United States Code, Title 47:

§220(j)

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

United States Code, Title 47:

§221(b)

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

United States Code, Title 47:

§402(a) Judicial review of Commission's orders and decisions Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

United States Code, Title 47:

§401(b) Enforcement of chapter and orders of Commission; jurisdiction

If any person fails or neglect to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

§151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to [make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges] for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.